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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1136

MURRAY TILLMAN, *et al.*,
Petitioners,

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

RELEVANT DOCKET ENTRIES

10.13.69 – Complaint filed in United States District Court for the District of Maryland

12. 5.69 – Motion of defendants, except Richard E. McIntyre, to strike

12. 5.69 – Motion of defendant Richard E. McIntyre for relief pursuant to Rule 12, F.R.Civ.P.

4.28.70 – Motion of plaintiffs for judgment on the pleadings or summary judgment against defendant Association and individual defendants, except defendant McIntyre, and motion for summary judgment against defendant McIntyre, or, in the alternative, motion for preliminary injunction against all defendants

4.30.70 – Opposition of defendants, except Richard E. McIntyre, to motion for judgment on the pleadings, summary judgment, and injunction

4.30.70 – Motion of defendants, except Richard E. McIntyre, to dismiss

5.13.70 – Motion of defendant Richard E. McIntyre for summary judgment

5.15.70 – Motion of defendants, except Richard E. McIntyre, for summary judgment

5.27.70 – All Law Motions pending as of this date denied by the Court, Northrop, J., with leave to plaintiffs to file amended complaint

6. 1.70 – Amended complaint filed

6.10.70 – Answer of defendant Wheaton-Haven Recreation Association, Inc. to amended complaint

6.10.70 – Motion of defendants, except Wheaton-Haven Recreation Association, Inc. and Richard E. McIntyre, to dismiss

6.10.70 –	Motion of defendant Wheaton-Haven Recreation Association, Inc. for judgment on the pleadings
6.10.70 –	Motion of defendant Richard E. McIntyre to dismiss
6.23.70 –	Plaintiffs' motion to strike answer of defendant Wheaton-Haven Recreation Association, Inc., and to renew their motion for summary judgment or, in the alternative, for preliminary injunction
7. 8.70 –	Opinion and order of the District Court granting defendants' motion for summary judgment
7.13.70 –	Plaintiffs' notice of appeal filed
7.16.70 –	Plaintiffs' motion for expedited hearing or summary reversal, or in the alternative, for injunction pending appeal
10. 6.70 –	Oral argument before Court of Appeals for the Fourth Circuit
10.27.71 –	Opinion and judgment of the Court of Appeals
12.16.71 –	Petition for rehearing and suggestion for rehearing *en banc* denied

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MURRAY TILLMAN AND ROSALIND N. TILLMAN
10514 Cascade Place
Silver Spring, Maryland

HARRY C. PRESS AND FRANCELLA PRESS
2016 Cascade Road
Silver Spring, Maryland

GRACE ROSNER
9011 Lindale Road
Bethesda, Maryland,

Plaintiffs

v.

Civil Action
No. 21294

WHEATON-HAVEN RECREATION
ASSOCIATION, INC.
10910 Horde Street
Silver Spring, Maryland 20902

Serve:

Mr. Philip S. Trusso
Resident Agent
11022 Burnley Terrace
Silver Spring, Maryland

BERNARD KATZ
11013 Bucknell Drive
Silver Spring, Maryland

PHILIP S. TRUSSO
11022 Burnley Terrace
Silver Spring, Maryland

SIDNEY M. PLITMAN
10511 Cascade Place
Silver Spring, Maryland

ANOTHONY J. DeSIMONE :
1806 Glenpark Drive :
Silver Spring, Maryland :
:
BRIAN CARROLL :
11106 Dodson Lane :
Silver Spring, Maryland :
:
ALBERT FRIEDLAND :
11014 Cone Lane :
Silver Spring, Maryland :
:
MRS. ROBERT BENNINGTON :
2000 Dayton Street :
Silver Spring, Maryland :
:
MRS. ANTHONY ABATE :
2107 Prichard Road :
Silver Spring, Maryland :
:
RICHARD E. McINTYRE :
10403 Amherst Avenue :
Silver Spring, Maryland :
:
JAMES V. WELCH :
11019 Burnley Terrace :
Silver Spring, Maryland :
:
MRS. ELLEN FENSTERMAKER :
1715 Republic Road :
Silver Spring, Maryland :
:
WALTER F. SMITH, JR. :
11104 Dodson Lane :
Silver Spring, Maryland :
:
JAMES M. WHITTLES :
11107 Bucknell Drive :
Silver Spring, Maryland :
Defendants :

AMENDED COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION, SPECIFIC PERFORMANCE, AND DAMAGES

I.

Jurisdiction of the court is invoked pursuant to 28 U.S.C. Sections 1331, 1337, 1343; 2201 and 2202; 42 U.S.C. Sections 1981, 1982, 1983, 1988, and 2000 and the 13th and 14th Amendments to the Constitution of the United States.

II.

A. Plaintiffs Murray Tillman and Rosalind N. Tillman, are husband and wife and are hereinafter called Plaintiffs Mr. and Mrs. Murray Tillman. They are citizens of the United States of America and are citizens and residents of the State of Maryland and Montgomery County. Plaintiffs Mr. and Mrs. Murray Tillman reside at 10514 Cascade Place, Silver Spring, Montgomery County, Maryland.

B. Plaintiffs Harry C. Press and Francella Press, are husband and wife and are hereinafter called Plaintiffs Dr. and Mrs. Harry C. Press. They are citizens of the United States of America and are citizens and residents of the State of Maryland and Montgomery County. Dr. and Mrs. Harry C. Press reside at 2016 Cascade Road, Silver Spring, Montgomery County, Maryland.

C. Plaintiff Grace Rosner is a citizen of the United States of America and is a citizen and resident of the State of Maryland and Montgomery County. She resides at 9011 Lindale Road, Bethesda, Montgomery County, Maryland.

III.

A. Plaintiffs Dr. and Mrs. Harry C. Press bring this action on their own behalf and pursuant to Rule 23(b)(2) of

the Federal Rules of Civil Procedure, on behalf of all similarly situated Negro citizens living within a 3/4 mile radius of the office and swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc. Such Negro citizens are barred by Defendant Wheaton-Haven Recreation Association, Inc. from applying for and acquiring membership and a certificate of membership in Defendant Wheaton-Haven Recreation Association, Inc.

B. Plaintiffs Mr. and Mrs. Murray Tillman bring this action on their own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all similarly situated citizens who are members of and own a certificate of membership in Defendant Wheaton-Haven Recreation Association, Inc. Said members are barred by Defendant Wheaton-Haven Recreation Association, Inc. from bringing Negro guests to the swimming pool operated by Defendant Wheaton-Haven Recreation Association, Inc.

C. Plaintiff Mrs. Grace Rosner brings this action on her own behalf and, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all similarly situated Negro citizens who are barred by Defendant Wheaton-Haven Recreation Association, Inc., from being brought, as guests to swim at the swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc.

IV.

A. Defendant Wheaton-Haven Recreation Association, Inc. is a non-profit Maryland Corporation organized on May 23, 1958, for the purpose of operating a swimming pool for the recreation of the community described in its By-Laws. The Defendant Wheaton-Haven Recreation

Association, Inc. maintains its offices and swimming pool facility at 10910 Horde Street, Silver Spring, Maryland 20902.

B. Defendants Bernard Katz, residing at 11013 Bucknell Drive, Silver Spring, Maryland; Philip S. Trusso, residing at 11022 Burnley Terrace, Silver Spring, Maryland; Sidney M. Plitman, residing at 10511 Cascade Place, Silver Spring, Maryland; Anthony J. DeSimone, residing at 1806 Glenpark Drive, Silver Spring, Maryland; Brian Carroll, residing at 11106 Dodson Lane, Silver Spring, Maryland; Albert Friedland, residing at 11014 Cone Lane, Silver Spring, Maryland; Mrs. Robert Bennington, residing at 2000 Dayton Street, Silver Spring, Maryland; Mrs. Anthony Abate, residing at 2107 Prichard Road, Silver Spring, Maryland; Richard E. McIntyre, residing at 10403 Amherst Avenue, Silver Spring, Maryland; James V. Welch, residing at 11019 Burnley Terrace, Silver Spring, Maryland; Mrs. Ellen Fenstermaker, residing at 1715 Republic Road, Silver Spring, Maryland; Walter F. Smith, Jr., residing at 11104 Dodson Lane, Silver Spring, Maryland and James M. Whittles, residing at 11107 Bucknell Drive, Silver Spring, Maryland, were, at times material herein, officers and/or members of the Board of Directors of Defendant Wheaton-Haven Recreation Association, Inc., and are hereinafter called Defendant Officers and Directors.

V.

A. Membership in Defendant Wheaton-Haven Recreation Association, Inc. is not personal to the individual but runs to family units and the certificates of membership are so issued. Defendant Wheaton-Haven Recreation Association, Inc.'s By-Laws, adopted July 31, 1958, contain no racial covenants or restrictions on membership, which is limited

only to a prescribed geographic area (3/4 mile radius from the pool) and thirty (30) percent of the total membership may be excluded from that limitations.

B. By 1967 the neighborhood within the prescribed geographic area was a racially integrated community.

VI.

A. Defendant Wheaton-Haven Recreation Association, Inc.'s pool facility was constructed during 1958 and 1959 pursuant to a special exception granted September 20, 1958 by the Montgomery County Board of Appeals, pursuant to Zoning Ordinance as recited in Sec. 107-28(2-4) Montgomery County Code (1955).

B. The foregoing zoning provision was enacted by the Montgomery County Council by Ordinance No. 3-28 dated May 24, 1955. The Council stated therein that ". . . the action sets up the community swimming pools as a special exception . . . The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

C. On August 13 and August 23, 1958, the Montgomery County Board of Appeals conducted public hearings on Case No. 656, Defendant Wheaton-Haven Recreation Association, Inc.'s application for the special exception. The record of said proceedings indicates that Defendant Wheaton-Haven Recreation Association, Inc.'s witnesses testified that the County was unsuccessfully approached to construct a pool; they further testified that in lieu of County action Defendant Wheaton-Haven Recreation Association, Inc. initiated efforts to serve the imperative recreational

needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended to be used for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

VII.

A. During hearings before the U. S. Senate Finance Committee regarding H. R. 7125 (later to become P. L. 85.859-Excise Tax Exemption) conducted on July 15, 16, and 17, 1958, Irving J. Rotkin, Chairman of the Montgomery County Community Pools Association, testified on behalf of the Montgomery County Community Pools Association, that the community pool was an instrument utilized to serve an imperative recreational need in Montgomery County owing to the failure of government to construct public pools due to lack of adequate resources. It was further asserted that pools provide a healthy and constructive outlet for youth and general benefit to the public at large, and that they provide recreation to lower middle income groups that would otherwise be unavailable. Mr. Rotkin further stated that the community pool was distinguished from private country clubs.

B. Defendant Wheaton-Haven Recreation Association, Inc. is exempt from and does not pay Federal or State income taxes under the provision of the U. S. Internal Revenue Code, Section 501(c)(7) and the Maryland Code, Art. 81, Sec. 88(g)(8). Defendant Wheaton-Haven Recreation Association, Inc. also obtained an exemption from U. S. Excise Taxes during the years 1958 through 1964. All this tax relief was granted Defendant Wheaton-Haven Recreation Association, Inc. because of its function as a community swimming facility.

C. Defendant Wheaton-Haven Recreation Association, Inc., until May, 1968, posted the telephone number of the membership chairman on a large sign located in a conspicuous position at the pool, thus serving as an open invitation for membership. It was common knowledge in the community that Defendant Wheaton-Haven Recreation Association, Inc.'s membership was open.

VIII.

Defendant Wheaton-Haven Recreation Association, Inc. is a public accomodation as described and defined in the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000).

IX.

A. Since on or about April and May 1968, and continuing to date, Defendant Wheaton-Haven Recreation Association, Inc. and its Defendant Officers and Directors have refused and continue to refuse to make available an application for membership to Plaintiffs Dr. and Mrs. Harry C. Press and refused, and continue to refuse, to accept them into membership and to allow them to acquire a certificate of membership solely because Plaintiffs Dr. and Mrs. Harry C. Press are Negroes and this was done intentionally pursuant to Defendants' practices and policies of discriminating against Plaintiffs Dr. and Mrs. Harry C. Press and the class they represent because of their race and color.

B. Plaintiffs Dr. and Mrs. Harry C. Press live within the 3/4 mile radius prescribed for membership eligibility in Defendant Wheaton-Haven Recreation Association, Inc.'s By-Laws, meet all qualifications for membership and have desired and presently desire to join Defendant Wheaton-Haven Recreation Association, Inc., and obtain a certificate

of membership, and are able to assume the financial responsibilities of membership.

X.

A. Since on or about July 24, 1968, and continuing to date, Defendant Wheaton-Haven Recreation Association, Inc. and Defendant Officers and Directors have refused to permit Plaintiffs Mr. and Mrs. Murray Tillman to bring Plaintiff, Mrs. Grace Rosner, a Negro, as a guest into the pool facility solely because Mrs. Grace Rosner is a Negro. This was done intentionally pursuant to Defendants' practice of discriminating against Plaintiff Mrs. Grace Rosner and the class she represents on account of their race and color.

B. Since on or about July 20, 1968, and continuing to date, a rule was promulgated by Defendant Wheaton-Haven Recreation Association, Inc. and Defendant Officers and Directors, that limited guests to relatives of members of Defendant. This was done intentionally pursuant to Defendant's practice of discriminating against Plaintiff Mrs. Grace Rosner and the class she represents on account of their race and color.

C. At all times material Plaintiffs Mr. and Mrs. Murray Tillman tendered and were willing and able to pay the appropriate guest fees.

COUNT I.

A. Plaintiffs Dr. and Mrs. Harry C. Press repeat and reallege as part of this cause of action each and all of the allegations of fact contained in sections I - IX inclusive of this complaint, with like effect as if herein fully repeated, and, in addition, aver that the policy of Defendants of excluding Negroes from membership:

1. Constitutes a badge or token of slavery and an imposition of second-class citizenship in violation of the thirteenth Amendment of the Constitution of the United States;

2. Because of the extensive and substantial State and County participation in the origin, development and existence of Wheaton-Haven Recreation Association, Inc., renders the State of Maryland and Montgomery County copartners in Defendant's racially discriminatory conduct, making such conduct a violation of the fourteenth Amendment of the Constitution of the United States;

3. Interferes with Plaintiffs Dr. and Mrs. Harry C. Press' rights to purchase and own real or personal property, and to make and enforce contracts, because of their race and color in violation of the Civil Rights Acts of 1866 and 1870 (42 U.S.C. Secs. 1982, 1981).

4. Deprives Plaintiffs Dr. and Mrs. Harry C. Press of rights, privileges and immunities guaranteed by the Constitution and Laws of the United States because of their race and color in violation of the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983).

5. Interferes with Plaintiffs Dr. and Mrs. Harry C. Press' right to use and enjoy facilities of public accommodation because of their race or color in violation of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000).

B. As a direct and proximate result of the wrongful acts of Defendants alleged herein, Plaintiffs Dr. and Mrs. Harry C. Press have suffered actual damages and will continue to suffer damages from humiliation and embarrassment caused by the refusal of Defendant Officers and Directors and Defendant Wheaton-Haven Recreation

Association, Inc. to admit them to membership because of their race and the deprivation by Defendants of Plaintiffs Dr. and Mrs. Harry C. Press' constitutional and statutory rights as herein before described. Because of Defendant Wheaton-Haven Recreation Association, Inc.'s and Defendant Officers and Directors' willful, intentional and malicious refusal to permit Plaintiffs, or the class they represent, to become members of the Defendant Wheaton-Haven Recreation Association, Inc. because of their race or color, Plaintiffs claim actual and punitive or exemplary damages in the amount of $10,000.00.

COUNT II.

A. Plaintiff Mrs. Grace Rosner repeats and realleges, as part of this cause of action, each and all of the allegations of fact contained in sections I - VIII, inclusive, and section X of this complaint, with like effect as if herein fully repeated, and, in addition, aver that the policy of Defendants of refusing to permit Negro guests:

1. Constitutes a badge or token of slavery and an imposition of second-class citizenship in violation of the thirteenth Amendment of the Constitution of the United States;

2. Because of the extensive and substantial State and County participation in the origin, development and existence of Wheaton-Haven Recreation Association, Inc., renders the State of Maryland and Montgomery County co-partners in Defendants' racially discriminatory conduct, making such conduct a violation of the fourteenth Amendment of the Constitution of the United States;

3. Interferes with Plaintiff Mrs. Grace Rosner's rights to make and enforce contracts because of her race or color

in violation of the Civil Rights Act of 1870 (42 U.S.C. Sec. 1981).

4. Deprives Plaintiff Mrs. Grace Rosner of rights to purchase, lease and hold real and personal property and to make and enforce contracts, because of her race or color, in violation of the Civil Rights Acts of 1866 and 1870 (42 U.S.C. Secs. 1981, 1982).

5. Interferes with Plaintiff Mrs. Grace Rosner's right to use and enjoy facilities of public accommodation because of her race or color in violation of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000).

B. As a direct and proximate result of the wrongful acts of Defendants alleged herein, Plaintiff Mrs. Grace Rosner has suffered actual damages and will continue to suffer damages from humiliation and embarrassment caused by Defendants' refusal to admit Negro guests and the deprivation by Defendants of Plaintiff Mrs. Grace Rosner's constitutional and statutory rights as herein before described. Because of Defendant Officers' and Directors' and Defendant Wheaton-Haven Recreation Association, Inc. willful, intentional and malicious refusal to permit Plaintiff Mrs. Grace Rosner, or the class she represents, to be admitted as guests to the swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc., because of their race or color, Plaintiff Mrs. Grace Rosner claims actual and punitive or exemplary damages in the amount of $10,000.00.

COUNT III.

A. Plaintiffs Mr. and Mrs. Murray Tillman repeat and reallege, as part of this cause of action, each and all of the allegations of fact contained in sections I - X, inclusive of this complaint, with like effect as if herein fully

repeated, and, in addition, aver that the policy of Defendants of excluding Negroes from membership and refusing to permit Negro guests:

1. Constitutes a badge or token of slavery and an imposition of second-class citizenship in violation of the thirteenth Amendment of the Constitution of the United States;

2. Because of the extensive and substantial State and County participation in the origin, development and existence of Wheaton-Haven Recreation Association, Inc., renders the State of Maryland and Montgomery County co-partners in Defendants' racially discriminatory conduct, making such conduct a violation of the fourteenth Amendment of the Constitution of the United States;

3. Deprives Plaintiffs Mr. and Mrs. Murray Tillman of rights to purchase, lease, sell, hold and convey real and personal property, and to make and enforce contracts without interference or restriction from any source on the basis of race or color, in violation of the Civil Rights Acts of 1866 and 1870 (42 U.S.C. Secs. 1981 and 1982).

4. Deprives Plaintiffs Mr. and Mrs. Murray Tillman of rights and privileges and immunities guaranteed by the Constitution and Laws of the United States because of their desire to associate with members of both the Negro and Caucasian races, in violation of the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983).

5. Interferes with Plaintiff Mr. and Mrs. Murray Tillman's right to use and enjoy facilities of public accommodation because of their desire to associate with members of both the Negro and Caucasian races in violation of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000).

B. The relationship of Plaintiffs Mr. and Mrs. Murray Tillman to Defendant Wheaton-Haven Recreation Association, Inc. is founded upon contracts which contain no mention of Defendants' discriminatory policies. Defendant Wheaton-Haven Recreation Association, Inc.'s By-Laws do not place any restriction on guest privileges and do not maintain any racially discriminatory policy.

C. The rule adopted by Defendant Officers and Directors which limited guests to relatives of members was promulgated and enforced only for the purpose of excluding Negro guests and is therefore void as against public policy, as herein before described.

D. In preventing Plaintiffs Mr. and Mrs. Murray Tillman from bringing Negro guests to the swimming pool facility, Defendants are acting in violation of Plaintiffs Mr. and Mrs. Murray Tillman's contract rights.

E. As a direct and proximate result of the wrongful acts of Defendant Wheaton-Haven Recreation Association, Inc. and Defendant Officers and Directors alleged herein, Plaintiffs Mr. and Mrs. Murray Tillman suffered actual damages, and will continue to suffer damages, a) caused by breach of the contract by the Defendants as described herein; b) from humiliation and embarrassment caused by Defendants' refusal to allow members to bring Negro guests; and c) from the deprivation by Defendants' of Plaintiffs Mr. and Mrs. Murray Tillman's constitutional and statutory rights as herein before described. Because of Defendant Officers' and Directors' and Defendant Wheaton-Haven Recreation Association, Inc.'s willful and malicious refusal to permit Plaintiffs Mr. and Mrs. Murray Tillman, or the class they represent, to bring Negro guests to the swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc., Plaintiffs Mr. and Mrs. Murray

Tillman claim actual and punitive or exemplary damages in the amount of $10,000.00.

DAMAGE IS CONTINUING AND IRREPARABLE

Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a permanent injunction and a decree of specific performance is their only means of securing adequate relief. Plaintiffs and the classes they represent are now suffering, and will continue to suffer, irreparable injury from Defendants' acts and policy or practice of racial discrimination unless relief is provided by this Court.

WHEREFORE, Plaintiffs respectfully pray that this Court enter judgment for Plaintiffs as follows:

1. Granting Plaintiffs and the classes they represent a preliminary and permanent injunction enjoining Defendant Officers and Directors and Defendant Wheaton-Haven Recreation Association, Inc., its agents, employees and those acting in concert with it from maintaining a policy of discrimination against Negroes seeking to become members of Defendant Wheaton-Haven Recreation Association, Inc., or to enter and use the swimming pool facility operated by Defendant Wheaton-Haven Recreation Association, Inc. as guests, and from maintaining or continuing a custom, policy or practice of discriminating against Plaintiffs and the classes they represent on the grounds of race or color or because they wish to associate with both members of the Negro and Caucasian races.

2. Ordering Defendant Wheaton-Haven Recreation Association, Inc. be ordered to perform its contract with Plaintiffs Mr. and Mrs. Murray Tillman, who are members of Defendant Wheaton-Haven Recreation Association, Inc. and that

Defendant Officers and Directors and Defendant Wheaton-Haven Recreation Association, Inc. specifically be ordered to permit Plaintiffs Mr. and Mrs. Murray Tillman to bring to Defendant Wheaton-Haven Recreation Association, Inc. guests of any race, color, religion or national origin.

3. Declaring the policy of Defendant Officers and Directors and Defendant Wheaton-Haven Recreation Association, Inc., its agents, servants, and employees, in excluding members of the Negro race from membership, ownership of certificate of membership, or guest privileges, to be in violation of the laws and the Constitution of the United States.

4. Granting Plaintiffs Dr. and Mrs. Harry C. Press judgment against all Defendants, jointly and severally, for actual and punitive or exemplary damages in the amount of $10,000.00.

5. Granting Plaintiff Mrs. Grace Rosner judgment against all Defendants, jointly and severally, for actual and punitive or exemplary damages in the amount of $10,000.00.

6. Granting Plaintiffs Mr. and Mrs. Murray Tillman judgment against all Defendants, jointly and severally, for actual and punitive or exemplary damages in the amount of $10,000.00.

7. Awarding Plaintiffs their costs herein.

8. Awarding Plaintiffs reasonable attorney's fees.

9. Granting Plaintiffs and the class they represent such further and additional relief as the Court may deem just and proper.

Raymond W. Russell
22 West Jefferson Street
Rockville, Md. 20850

M. Michael Cramer
358 Hungerford Drive
Rockville, Maryland

Allison W. Brown, Jr.
Suite 501, 1424 - 16th Street, N.W.
Washington, D.C. 20036

Samuel A. Chaltovitz
11509 Rokeby Avenue
Kensington, Maryland

State of Maryland)
County of Montgomery) ss.:

The undersigned, being duly sworn, deposes and says that he is a plaintiff in the above action; that he has read the foregoing complaint and states that it is true to the best of his knowledge, belief or information.

/s/ Harry C. Press
Plaintiff Dr. Harry C. Press

Sworn to before me this 18th
day of September, 1969
/s/ Lila Kanstoroom
Notary Public

State of Maryland)
County of Montgomery) ss.:

The undersigned, being duly sworn, deposes and says that she is a plaintiff in the above action; that she has read the foregoing complaint and states that it is true to the best of her knowledge, belief or information.

/s/ Francella Press
Plaintiff Mrs. Francella Press

Sworn to before me this 18th
day of September, 1969
/s/ Lila Kanstoroom
Notary Public

State of Maryland)
County of Montgomery) ss.:

The undersigned, being duly sworn, deposes and says that he is a plaintiff in the above action; that he has read the foregoing complaint and states that it is true to the best of his knowledge, belief or information.

/s/ Murray Tillman
Plaintiff Mr. Murray Tillman

Sworn to before me this 18th
day of September, 1969
/s/ Lila Kanstoroom
Notary Public

State of Maryland)
County of Montgomery) ss.:

The undersigned, being duly sworn, deposes and says that she is a plaintiff in the above action; that she has read the foregoing complaint and states that it is true to the best of her knowledge, belief or information.

/s/ Rosalind N. Tillman
Plaintiff Mrs. Rosalind N. Tillman

Sworn to before me this 18th
day of September, 1969
/s/ Lila Kanstoroom
Notary Public

State of Maryland)
County of Montgomery) ss.:

The undersigned, being duly sworn, deposes and says that she is a plaintiff in the above action; that she has read the foregoing complaint and states that it is true to the best of her knowledge, belief or information.

/s/ Grace Rosner
Plaintiff Mrs. Grace Rosner

Sworn to before me this 18th
day of September, 1969
/s/ Lila Kanstoroom
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

ANSWER

The Defendant, Wheaton-Haven Recreation Association, Inc., by its attorney, Henry J. Noyes, in answer to Amended Complaint, says:

I

That it denies the jurisdiction of the Court in that none of the sections of the United States Code cited are applicable to the controversy herein, nor do the thirteenth and fourteenth amendments to the Constitution of the United States apply.

II

A. That it admits the allegations contained herein.

B. That it admits the allegations contained herein.

C. That it admits the allegations contained herein.

III

A. That it denies that this is a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, in that the Plaintiffs, Press, have no standing to bring such suit, and have failed to set forth with particularity the efforts of the Plaintiffs to secure from the managing directors of the Defendant corporation, or its shareholders the action they desire, and the reasons for their failure to obtain such action, or the reasons for not making such effort.

B. That it denies that this is a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, in that the Plaintiffs, Tillman, have no standing to bring such suit, and have failed to set forth with particularity the efforts of the Plaintiffs to secure from the managing directors of the Defendant corporation, or its shareholders the action they desire, and the reasons for their failure to obtain such action, or the reasons for not making such effort.

C. That it denies that this is a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, in that the Plaintiff, Rosner, has no standing to bring such suit, and has failed to set forth with particularity the efforts of the Plaintiff to secure from the managing directors of the Defendant corporation, or its shareholders the action she desires, and the reasons for her failure to obtain such action, or the reasons for not making such effort.

IV

A. That it admits the allegations contained herein.

B. That it admits the allegations contained herein.

V

A. That it denies the allegations contained herein.

B. That it denies the allegation contained herein, in that it has no specific information, standards, or guidelines to determine what is a "racially integrated community".

VI

A. That it admits the allegations contained herein.

B. That it denies the allegations contained herein, for the reason that it has no specific information as to what the Montgomery County Council stated in May of 1955.

C. That it denies the allegation contained herein for the reason that it has no independent recollection as to what witnesses testified to in 1958.

VII

A. That it denies the allegation contained herein for the reason that the alleged statements of Irving J. Rotkin,

whomever he may be, if made at all, were made prior to the construction of the swimming pool owned by the Defendant, were made without any authorization by the Defendant, its agents, servants, and/or employees, and are not binding upon the said Defendant, for whatever relevancy they may have.

B. That it admits the allegation that it is exempt from Federal income taxes pursuant to U. S. Internal Revenue Code, Section 501,(c)(7) which grants such exemption to "clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which enures to the benefit of any private shareholder", denies any exemption under the Annotated Code of Maryland, Article 81, Section 88(g)(8), since the said Statute in no way relates to State income taxes, but rather relates to purchase by County Commissioners of properties offered for non-payment of real estate taxes; that it denies that it obtained an exemption from U. S. Excise taxes as alleged; that it denies that the said tax relief was granted because of its function of a community swimming facility, and affirmatively represents that it pays State and County real estate taxes.

C. That it denies that the telephone number of the membership chairman was posted as an open invitation for membership, and has no information to either admit or deny what was "common knowledge" in the community.

VIII

That it denies the allegation contained herein and affirmatively represents and avers that the Civil Rights Act of 1964 (42 U.S.C. Section 2000), by its very terms, is inapplicable to the Defendant corporation, or any of its activities.

IX

A. That it denies the allegations contained herein.

B. That it denies the allegations contained herein.

X.

A. That it denies the allegations contained herein.

B. That it denies the allegations contained herein.

C. That it denies the allegations contained herein.

COUNT ONE

A. That it denies the allegations contained herein.

1. That it denies the allegations contained herein.
2. That it denies the allegations contained herein.
3. That it denies the allegations contained herein.
4. That it denies the allegations contained herein.
5. That it denies the allegations contained herein.

B. That it denies the allegations contained herein.

COUNT TWO

A. That it denies the allegations contained herein.

1. That it denies the allegations contained herein.
2. That it denies the allegations contained herein.
3. That it denies the allegations contained herein.
4. That it denies the allegations contained herein.
5. That it denies the allegations contained herein.

B. That it admits the allegations contained herein with the exception of that allegation that states "Defendant Wheaton-Haven Recreation Association, Inc.'s By-laws do not place any restriction on guest privileges," which is specifically denied.

C. That it denies the allegations contained herein.

D. That it denies the allegations contained herein.

E. That it denies the allegations contained herein.

DAMAGE IS CONTINUING AND IRREPARABLE

The Defendant denies the allegation contained herein.

WHEREFORE, the Defendant prays:

1. That the Complaint be dismissed with its proper costs.

/s/ Henry J. Noyes
Attorney for Defendant

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MOTION TO DISMISS

The Defendants, Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, by their attorney, Henry J.

Noyes, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure move this Honorable Court to dismiss Amended Complaint filed by the Plaintiffs, and for reasons state:

1. That the said Complaint fails to state a claim upon which relief can be granted against the individual Defendants.

POINTS AND AUTHORITIES

The Amended Complaint, in paragraph IV B. names the individual Defendants as "officers and/or members of the Board of Directors of Defendant Wheaton-Haven Recreation Association, Inc." Paragraphs IX and X, of the said allegations of fact, state that "its Defendant officers and directors have refused and continue to refuse to make available an application for membership to Plaintiffs Dr. and Mrs. Harry C. Press, and refused, and continue to refuse, to accept them into membership * * * solely because they are Negroes". The remainder of the said Amended Complaint is devoid of any further reference to the individual Defendants. This case therefore falls squarely within the gambit of Fletcher v. Havre De Grace Fireworks Company, Inc., et al., 229 Md. 196, and cases and text cited therein, at Page 200:

> "In order to show that the officers and directors of the fireworks company are personally liable for the tort committed by the corporation, or, in other words, state a cause of action against the officer-director defendants that is not demurrable, we think section c requires the plaintiff to clearly state such facts as will charge the individual defendants with having either *specifically directed*, or *actively participated* or

cooperated in, a particular act of commission or omission that wrongfully triggered the series of explosions. *Levi v. Schwartz*, 201 Md. 575, 95 A.2d 322 (1953). See also *Lobato v. Pay-Less Drug Stores*, 261 F.2d 406 (C.A. 10 1958), where the Court, citing the *Levi* case, points out (at p. 409) that "(s)pecific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party is necessary to generate individual liability in damages of an officer or agent of a corporation for the tort of the corporation." To the same effect, see also 3 Fletcher, *Corporations* (Perm. Ed.), Section 1137; 13 Am. Jur., *Corporations*, Section 1087; 6 M.L.E., *Corporations*, Section 232. It is manifest, we think, that the allegation in the trespass q.c.f. count that the officer-director defendants had and exercised "complete direction and control over all phases of the conduct of the business of the defendant company," and the more comprehensive allegation of similar import in the negligence, extra-hazardous and nuisance counts, fall far short of alleging that the individual defendants had personally directed or actively participated or cooperated in the tort committed by the corporation. Cf. *Callahan v. Clemens*, 184 Md. 520, 41 A.2d 473 (1945).

The allegations set forth in the Amended Complaint fall far short of the requirements set forth in *Fletcher, supra*. There is no allegation as to which of the individual Defendants were officers or members of the Board of Directors, or both. There is no indication that their role, if any, was anything more than passive. There is not even an

allegation that anyone *specifically directed,* or *actively participated,* or *cooperated in* any of the allegations mentioned in the said Complaint. The defendants respectfully pray that the amended complaint be dismissed.

/s/ Henry J. Noyes
Attorney for Defendants

[Certificate of Service, dated June 9, 1970]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MOTION FOR JUDGMENT ON THE PLEADINGS

The Defendant, Wheaton-Haven Recreation Association, Inc., by its attorney, Henry J. Noyes, moves for judgment on the pleadings, in its favor, and for reasons states:

1. That none of the Sections of the United States Code, as cited, upon which the Plaintiffs rely, are applicable to the facts as alleged by the said Plaintiffs.

POINTS AND AUTHORITIES

Other than the jurisdictional sections of the United States Code, set forth in Title 28, the Plaintiffs rely on five sections of the Code, in Title 42, being Sections 1981, 1982, 1983, 1988, and 2000. An analysis of each of these sections indicates that none applies to the pending controversy, even assuming the truth of all of the allegations set forth in the Amended Complaint.

42 U.S.C. SECTION 1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

This Statute is a lineal descendant of the Fourteenth Amendment to the United States Constitution, being the equal protection of the laws clause. The recent Supreme Court case of Adickes v. S. H. Kress and Company, No. 79, October Term, 1969, decided on June 1, 1970, reaffirms the well-established principles that individual invasion of individual rights is not the subject matter of the Fourteenth Amendment. It is a State action of a particular character that is prohibited. A prerequisite to recovery under Section 1981 requires some showing of State involvement, i.e., that the Defendants deprived the Plaintiffs of their constitutional rights under color of a Statute, ordinance, regulation, custom or usage, of a State, under color of law. The Amended Complaint is devoid of any involvement by Montgomery County, Maryland, or the State of Maryland.

42 U.S.C. SECTION 1982

"All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Statute is derived from the citizenship clause of the Fourteenth Amendment to the United States Constitution. The Plaintiffs apparently rely on the recent Supreme Court case of Sullivan v. Little Hunting Park, Inc., No. 33, October Term, 1969, decided on December 15, 1969. However, the Plaintiffs, Press, make no allegation, and can make no allegation, that the former owners of their home were members of the pool, and that they were deprived of any right to obtain an assignment of membership, as was the situation in the Little Hunting Park case. The Plaintiffs Tillman, make no allegation that they have been denied the right to convey any property, either real or personal, to Press. Press makes no allegation that he has been denied the right to purchase, lease, sell, hold, or convey any real or personal property from Tillman. The Defendants are unable to offer the Court any argument regarding the frivolous claim of the Plaintiff Rosner, under this Statute, since there appears to be no law, State, Federal, statutory, or common, that would support her vague claim. In addition, the state action, or involvement, required by Adickes v. Kress, supra, is totally lacking.

42 U.S.C. SECTION 1983

"Every person who, under color of any statute, ordinance, regulation, custom or usuage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Statute is also derived from the citizenship clause of the Fourteenth Amendment to the United States Constitution. Adickes v. Kress, supra, is directly on point, and bars recovery herein, since there is no State involvement.

> "Section 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of State compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in Shelley v. Kraemer, 334 U.S. 1, 13, Section 1 of that Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

42 U.S.C. SECTION 1988

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

This is a jurisdictional statute, relating to damages, and, of course, is inapplicable in absence of liability.

42 U.S.C. SECTION 2000(a)

Under Adickes v. Kress, supra, it should only be necessary to cite Section 2000(a)(d):

> "Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance or regulation; or (2) is carried on under color of any custom, or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof."

In addition, the only possible category which would place the Defendant swimming pool, within this statute, would be the classification of said swimming pool as an "other place of exhibition or entertainment" as contemplated by Section 2000(a)(b). Although it is not conceded that the said swimming pool falls into this category, the additional requirement of Section 2000(a)(c) that "it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce" bars recovery under this Section.

CONCLUSION

Adickes v. Kress, supra, has narrowly limited recovery under any of the cited statutes, and has tacitly overruled Sullivan v. Little Hunting Park, Inc. The State involvement, required to be shown, is an active role in carrying on segregation under some sort of law, statute, ordinance, regulation, custom, usage, or specific requirement. The

Plaintiffs make no allegation, and indeed cannot do so. Quite to the contrary, the prior pleadings filed by the Plaintiffs indicate that Montgomery County, Maryland, through its Human Relations Commission, has conducted certain proceedings, in an attempt to end alleged segregation at the Defendants' pool, and has, by its County Attorney, instituted injunctive proceedings in the Circuit Court for Montgomery County, Maryland. It is therefore respectfully prayed that judgment on the pleadings be granted in favor of the Defendant, Wheaton-Haven Recreation Association, Inc.

/s/ Henry J. Noyes
Attorney for Defendants

[Certificate of Service, dated June 9, 1970]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MOTION OF E. RICHARD McINTYRE, DEFENDANT, TO DISMISS AND FOR OTHER RELIEF PURSUANT TO RULE 12, F.R.C.P.

E. Richard McIntyre, one of the Defendants herein, by John H. Mudd and H. Thomas Howell, his attorneys, moves the Court pursuant to Rules 12 and 56, Federal Rules of Civil Procedure, for an Order as follows:

1. To dismiss the action against the Defendant, E. Richard McIntyre, because the Amended Complaint fails to state a claim against the said Defendant upon which can be

granted; or in the alternative, for a summary judgment for said Defendant on the ground that there is no genuine issue as to any material fact and that the said Defendant is entitled to judgment as a matter of law. In support of said Motion, the Defendant refers the Court to the deposition of the said Defendant on file in these proceedings.

2. To strike from the Amended Complaint paragraph B of Counts I and II and paragraph E of Count III, and paragraphs 4, 5, and 6 of the prayer for relief, wherein Plaintiff claims actual and punitive or exemplary damages on the ground that the Amended Complaint fails to state a claim upon which such relief can be granted against the Defendant, E. Richard McIntyre, or in the alternative, for a partial summary judgment for the said Defendant on the ground that there is no genuine issue as to any material fact and that the said Defendant is entitled to judgment as a matter of law with respect to said alleged claim for damages. In support of said Motion, the Defendant refers the Court to the deposition of the said Defendant on file in said proceedings.

3. To dismiss the action as a class action, or, in the alternative, to require amendment of the Amended Complaint pursuant to Rule 23(d)(4) to eliminate therefrom allegations as to representation of absent persons, on the ground that the Amended Complaint fails to state a claim entitling Plaintiffs to relief in a class action in that the existence of a class is not shown and the members of the class are not so numerous as to make it impracticable to bring them before the Court.

4. To strike from the Amended Complaint pages 16, 17 and 18 thereof on the ground that the purported affidavits were executed eight months prior to the preparation and filing of the Amended Complaint and constitute

improper and ineffective verification of said Amended Complaint.

WHEREFORE, the Defendant, E. Richard McIntyre, demands judgment, dismissing this action with prejudice with costs in favor of the said Defendant.

/s/ John H. Mudd

/s/ H. Thomas Howell

10 Light Street (17th floor)
Baltimore, Maryland 21202
LE 9-5040
Attorneys for Defendant,
E. Richard McIntyre

[Certificate of Service, dated June 9, 1970]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption Omitted in Printing]

PLAINTIFFS' MOTION TO STRIKE THE ANSWER OF DEFENDANT WHEATON-HAVEN RECREATION ASSOCIATION, INC., AND TO RENEW THEIR MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR PRELIMINARY INJUNCTION

Plaintiffs move to strike the answer of defendant Wheaton-Haven Recreation Association, Inc., and to renew their motion for summary judgment or, in the alternative, for preliminary injunction. In support of their motion, plaintiffs show the Court as follows:

1. The answer of Wheaton-Haven Recreation Association, Inc. should be stricken, because it contains denials of many facts already admitted on the record by said defendant, and hence it constitutes a frivolous and dilatory pleading, and unnecessarily burdens the Court's processes.

2. Many of the facts now denied by defendant Wheaton-Haven Recreation Association, Inc. have already been established as undisputed on the basis of the original verified complaint, deposition, answers to interrogatories and admissions on file. In addition, said defendant filed a motion for summary judgment in response to the original complaint, alleging that there is "no genuine dispute between the parties as to any material fact." The amended complaint that was thereafter filed by plaintiffs did not change any allegation of fact, and hence the answer now filed by defendant Wheaton-Haven Recreation Association, Inc. is utterly in conflict with its earlier motion for summary judgment.

3. In accordance with the motion of plaintiffs previously filed herein, which plaintiffs now renew, the Court should grant summary judgment against all the defendants, except as to the issues of damages and the liability of individual officers and directors therefor, on the ground that there is no genuine issue as to any other material fact and that plaintiffs are entitled to judgment as a matter of law.

4. In the event the Court is of the view that it may not be able promptly to grant the relief requested in paragraph 3, *supra*, plaintiffs renew their motion for preliminary injunctive relief, as prayed for in the complaint and amended complaint, pending final determination of the issues involved herein. As grounds for the granting of a preliminary injunction, plaintiffs state:

a) This action is brought for the purpose of requiring defendants to cease discriminating against Negroes with respect to membership and guest privileges in a community swimming pool operated by defendants.

b) The racial discrimination practiced by defednants is plainly unlawful under the decisions in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969) and *Scott v. Young*, 421 F.2d 143 (C.A. 4, 1970), cert. denied, May 25, 1970, 38 U.S. Law Week 3461.

c) The swimming pool in question is open, and the right to use it is of value to plaintiffs, only during the summer swimming season of approximately May 30, 1970 to September 7, 1970.

d) Unless restrained by this Court, defendants will continue to engage in the conduct referred to.

e) Such conduct by defendants will result in irreparable injury and loss to the plaintiffs.

f) The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendants but will prevent irreparable injury to plaintiffs.

WHEREFORE, plaintiffs pray that the relief requested above be granted.

/s/ Raymond W. Russell

Raymond W. Russell
22 West Jefferson Street
Rockville, Md. 20850

Allison W. Brown, Jr.
Suite 501, 1424 16th St., N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

[Certificate of Service, dated June 21, 1970]

The opinion of the Court of Appeals is contained in the Petition for Certiorari (Appendix B, pp. B-1-31)

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The opinion of the District Court is contained in the Petition for Certiorari (Appendix C, pp. C-1-13)

[Filed December 16, 1971]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Caption omitted in printing]

ORDER

Upon consideration of the petition for rehearing and of the suggestion for rehearing en banc, the court having been polled and less than a majority of the panel having voted for a rehearing and less than a majority of the court having voted for a rehearing en banc,

IT IS NOW ORDERED that the petition for rehearing and the suggestion for rehearing en banc be, and they hereby are, denied.

For The Court:

/s/ Clement Haynsworth
Chief Judge, Fourth Circuit

***

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

AFFIDAVIT

City of Washington :
: ss
District of Columbia :

Samuel A. Chaitovitz, being duly sworn and of his own personal knowledge, deposes and says: I reside at 11509 Rokeby Ave., Kensington, Maryland. On Thursday evening, June 11, 1970, in the company of Bernard Katz, an officer and director of Wheaton-Haven Recreation Association, Inc., I went to the swimming pool facility operated by the Wheaton-Haven Recreation Association, Inc. While at the swimming pool I inspected the pump room and I observed, therein, various machinery and equipment including: pumps bearing a label indicating that they were manufactured by the Marlow Pumps Division of I.T.T. located in Midland, New Jersey and Longview, Texas; a motor bearing a label indicating that it was manufactured by U.S. Electrical Motors located in Los Angeles, California, and Milford, Conn.; and a chlorine feeder (Chlor-O-Feeder), bearing a label indicating that it was manufactured by Proportioneers, Inc. located in Providence, R. I.

On the same evening of June 11, 1970, in the home of Bernard Katz I inspected certain books containing some of the minutes of the board of directors' meetings of the Wheaton-Haven Recreation Association, Inc. The minutes for the board of directors' meeting of July 20, 1968 indicated that Director E. Richard McIntyre was present at the meeting. The minutes stated that there was discussion

of the guest problem and that Director Katz made a motion, seconded by Mrs. Hook, that guests to the pool be limited to relatives of members of Wheaton-Haven Recreation Association, Inc. The minutes indicate that after discussion, this motion was passed unanimously.

I have read the foregoing and state that it is true and accurate to the best of my knowledge and recollection.

/s/ Samuel A. Chaitovitz
Samuel A. Chaitovitz

Sworn to before me
this 22nd day of June, 1970

/s/ Robert B. Green
Notary Public
My Commission Expires Sept. 30, 1972

WHEATON-HAVEN RECREATION ASSOCIATION, INC.
10900 Horde Street, Wheaton, Md.

BY-LAWS

ARTICLE I – Name

The name of this Association shall be the Wheaton-Haven Recreation Association, Inc.

ARTICLE II – Purpose

The purpose of the Association shall be to own, construct, develop, operate, maintain and manage suitable facilities for the safe and healthful recreation of the Association's members, said facilities to include a swimming pool, and such other facilities as the Association may deem desirable. None of

net income or net earnings of the Association shall inure to the benefit of any member or of any individual.

ARTICLE III – Number and Qualifications of Members

1. Membership shall be open to bonafide residents (whether or not home owners) of the area within a three-quarter mile radius of the pool.

2. Membership in the Association may be extended to residents of other areas who shall have been recommended for membership by a member of the Association, provided, however, that members not resident in the areas described in (1) above shall not exceed thirty (30) per cent of the total membership.

3. Membership in the Association shall be granted applicats, qualified under (1) and (2) above, by an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose.

4. Applicants for membership elected as provided in (3) above shall upon payment of the initiation fee and the annual dues, and special assessments, if any, for the current year, be duly inscribed on the rolls of the Association. New members shall not, however, be subject to deficit assessments with respect to fiscal years in which they were not members.

5. A certificate of membership, in a form to be determined by the Board of Directors, shall be issued to each family unit.

6. Membership in the Association shall be limited to family units, which shall consist of one Senior Member and one or more Associate members.

(a) The Senior Member shall be the adult head of the family.

(b) 'Associate member' shall include and be limited to the spouse of the Senior Member, his natural and adopted children and legal wards, if unmarried, and adult relatives of the Senior Member if legally and permanently residing with him as an integral part of his household.

7. Membership shall be limited to 325 family units.

ARTICLE IV – Initiation Fee, Dues and Assessments

1. An initiation fee of $375 shall be paid by each family unit joining the Association on or after November 11, 1964.

2. Annual dues shall be paid by each family unit to the Association at the following rates:

(a) a family unit with four Association members or less, $50.00

(b) a family unit with five Association members, $55.00

(c) a family unit with more than five Associate members, $60.00

3. (a) A deficit assessment to cover a deficit in the previous season's operations may be levied on each member by the Board of Directors and, if levied, shall be announced at the annual meeting and in a notice sent by mail to the membership as soon after the annual meeting as possible.

(b) A special assessment for any other purpose shall only be levied by a majority vote of the membership present at the annual meeting or at a special meeting called for the purpose.

4. A family unit whose full annual dues have not been paid within six months after the beginning of the fiscal year, or which is more than ninety days in arrears in paying deficit or special assessment, may be dropped from the rolls after 10 days notice of such arrears by mail, by action of the Board of Directors.

5. The fiscal year of the Association shall begin on the first day of October of each year.

ARTICLE V – Inactive and Temporary Members

1. A family unit which cannot use the pool and other facilities of the Association may, at the discretion of the Board of Directors, be designated an Inactive membership for a given fiscal year. Application for such status shall be made in writing to the Board of Directors on or before May 15, of that year.

Inactive members shall not be liable for future deficit assessments levied to cover the period of operation during which they are in such inactive status, but the Senior Member of such family unit shall pay to the Association in advance a fee of $15.00 per year for the privilege of having his family unit designated an Inactive membership; provided however, that such annual fee shall not be payable by a Senior Member granted Inactive membership by reason of his service in the Armed Forces of the United States on active duty overseas.

No membership shall be designated an Inactive membership for more than three (3) consecutive years, except for good cause shown, and with the approval of two-thirds of the entire membership of the Board of Directors.

2. Temporary memberships, equal in number to those on inactive status, may at the discretion of the Board of

Directors – be extended in sequence to applicants from the list of those applying for regular membership. Such temporary membership shall, upon the payment of a fee set by the Board of Directors and deficit assessments (if any) entitle the temporary member to the same rights privileges and obligations – other than voting, as regular members, and to succeed to the next vacancy in the regular membership of the Association upon payment of proper fees and assessments.

3. At times when the membership rolls are full, applicants for membership shall be limited to the areas set forth in Article III, Section 1, and such applications shall be considered in chronological order of receipt. Such listing shall constitute a waiting list.

4. The privilege of temporary membership, set forth in Article V, Section 2, shall be available in sequence to applicants on the waiting list set forth in Section 3 above in order of seniority.

5. Applicants on the waiting list, when offered membership (temporary or full), must indicate, in writing, accompanied by the necessary fees, their acceptance within 10 days of such offer or such offer is to be submitted to the next person on the waiting list. A second offer of membership to an applicant must be accepted or the applicant's name, may at the option of the Board be placed at the bottom of the waiting list.

6. Persons applying for membership after the rolls are full must accompany such applications with a $5.00 fee. This fee is to be considered part of the required fees and dues for membership and is not to be returned unless the person moves from the areas of Article III, Section 1, before being offered a membership.

ARTICLE VI – Resignation of Membership

A member in good standing who wishes to resign from the Association shall inform the Secretary in writing of his decision. If the Association has a waiting list, the Board of Directors shall repurchase the membership with funds provided by the resale of the membership by refunding not less than ninety per cent (90%) of the initiation fee in effect at the time of resignation, less any deficit assessments covering any periods of operation during which he was an active member, and annual dues or special assessments due the Association; provided, however, that if the resignation is to become effective before the swimming season opens, he shall not be liable for payment of annual dues for the next swimming season. If no waiting list exists, the Board of Directors may, at its option, repurchase the membership for eighty per cent (80%) of the initiation fee in effect at the time of the resignation, less amounts due the Association as outlined above. The procedure with respect to members who are dropped from the rolls by appropriate action of either the Board or the membership shall be the same as set forth herein for members who resign. In any case where a member sells his property, the purchaser thereof may have the first option to purchase the membership of the seller solely from the Association at a rate equal to the initiation fee in effect at the time of the sale; provided, however, that the seller forwards a written resignation to the Association, and the purchaser makes a formal written application for membership to the Board of Directors within a reasonable period. Such membership application shall be subject to the approval of the Board of Directors.

A resignation by the seller shall not be considered as a vacancy within the meaning of Article V, paragraph 2.

ARTICLE VII – Membership Privileges

1. Only members of the Association shall be entitled to use the Association's pool and other facilities without the payment of other than annual dues and deficit assessments and special assessments, subject to such rules as the Board of Directors may from time to time adopt.

2. The use of the pool and other Association facilities by non-members and the children of non-members shall be subject to such rule as the Board of Directors may from time to time adopt.

ARTICLE VIII – Principal Office and Resident Agent

1. The principal office of the Association shall be located at the site of the swimming pool.

2. The President of the Association shall be its resident agent.

3. The books and records of the Association shall be kept at the principal office unless in the hands of an officer, the general counsel or accountant on official Association business.

ARTICLE IX – Meeting of Members

1. The annual meeting – The annual meeting of the members of the Association shall be held during the second week in November of each year, commencing with the calendar year 1961, at a time and place to be designated by the Board of Directors. Members shall be notified of this meeting in writing not less than twenty (20) days prior thereto. At such meeting the members may nominate from the floor and elect directors to the Board of Directors and transact such other business as may properly come before it. Any business to be brought before the membership at

the annual November meetings, whether it shall constitute "old" or "new" business, must be submitted in writing to the Board of Directors, not sooner than 60 days or less than 30 days prior to the said November annual meeting.

2. Special Meeting – A special meeting of the members of the Association may be called at any time by the Chairman of the Board of Directors, provided the Chairman first obtains consent in writing of not less than fifteen (15) members. A special meeting shall be called by the Chairman upon the request in writing of not less than twenty (20) per cent of the members or two-thirds (2/3) of the members of the Board of Directors. Due notice of special meetings shall be given to the members, in writing, not less than ten (10) days prior thereto. The purpose for which a special meeting is called shall be stated in the notice of said meeting, and no other business shall be entertained or transacted at this meeting.

3. A quorum shall consist of representatives of not less than ten (10) per cent of the family units constituting the membership. If no quorum is present, an adjournment shall be taken to a date not fewer than seven (7) nor more than fifteen (15) days thereafter, and the members present at any such later meeting shall constitute a quorum, regardless of the number of members present. A five (5) day notice shall be given for the later meeting.

4. Parliamentary Rule – The business transacted at all meetings of the Association and the Board of Directors shall be pursuant to the Rules of Order recommended for the use in business meetings of REA Coops as set forth in REA Bulletin 101-2 (Electric) reprinted in November 1955 by the Government Printing Office; except when said rules conflict with statute, the charter, or the By-Laws.

ARTICLE X – Board of Directors

1. The Board of Directors shall consist of fifteen (15) members all of whom (with the exception hereafter noted) shall be members of the Association at the time of their election. Exception: For the purpose of initially establishing the Association, the first Board of Directors shall consist of those persons who shall have actively participated in the work of the Swimming Pool Committee, or any subcommittee thereof and shall serve until the opening of the pool.

2. At the first annual meeting after the opening of the pool, there shall be elected by the members of the Association a new Board of Directors, five (5) of whom shall be elected for a term of one (1) year, five (5) shall be elected for a term of two (2) years and five (5) shall be elected for a term of three (3) years. Thereafter, at each annual meeting there shall be elected to the Board of Directors five (5) members, each to serve for a period of three (3) years.

3. Vacancies – In case of any vacancy in the membership of the Board of Directors, the remaining Directors by an affirmative vote of a majority may elect a successor to hold office until the next annual meeting, at which meeting a successor shall be elected to serve the unexpired portion of the term.

4. Absence of Directors – The Board of Directors, by a majority vote of its entire membership, may remove a director who is absent from three (3) consecutive regular meetings of the Board without valid reason, provided the Board notifies him in writing, at least five (5) days prior to a regular Board meeting of such contemplated action by the Board. Such action may be initiated only following at least two successive absences. The validity or

reasonableness of a directors explanation of absence shall be determined by the Board.

5. Place of Meeting – The directors shall hold their meetings at such place as may be designated by the Chairman of the Board with the agreement of a majority vote of the Board.

6. Meetings of the Directors – Regular meetings of the Board shall be held each month. Notices for such meetings shall be given to each director, in writing, at least five (5) days prior thereto. Special meetings of the Board may be called at any time by the Chairman of the Board provided he first obtains consent in writing of not less than four (4) directors. A special meeting shall be called by the Chairman upon request in writing of not less than six (6) directors, and due notice of such meeting stating the purpose thereof shall be given directors in writing not less than three (3) days prior thereto, excluding Sundays and holidays.

7. Quorum – A majority of the Board of Directors shall constitute a quorum for the transaction of business.

8. Absence of Chairman and Vice-Chairman – In the absence of the Chairman of the Board from a meeting the Vice-Chairman shall act in his place. In the absence of both the Chairman and Vice-Chairman a Director previously designated by the Chairman, may serve as acting Chairman. If no acting Chairman has been designated the directors attending the meeting from which both Chairman and Vice-Chairman are absent shall elect a temporary chairman.

9. Duties of the Board of Directors – In the Board of Directors shall be vested the authority for the general direction and control of the affairs of the Association. In

addition to the duties customarily performed by the boards of directors, the Board of Directors shall:

a. Act upon application for membership;

b. Fix the amount and character of, and approve, surety bonds required of any persons handling or having custody of funds;

c. Fill vacancies in the Board of Directors as herein provided;

d. Employ, fix the compensation, and prescribe the duties of such employees as may, in the discretion of the Board, be necessary;

e. Establish and approve rules and regulations for the safe and convenient use of the Association's facilities, and inform all members and other authorized users of the facilities of such rules and regulations;

f. Appoint one of its own members to be the contracting officer of the Association and to have such duties and authority as shall be granted from time to time by the Board by specific resolution;

g. Authorize and supervise investments of the Association;

h. Designate the depository or depositories for funds;

i. Each year recommend the amount of annual dues payable by members of the Association, as well as recommend the amount of any special fees or assessments deemed necessary for satisfactory operations of the Association, and establish the amounts of any necessary deficit assessments;

j. Call annual and special meetings of the members of the Association, as herein provided, and establish the time and place of such meetings;

k. Constitute and appoint committee, and define the duties and powers of the same;

l. Cause the books of the Association to be audited annually by auditors selected by the Board, such audit to be performed by persons who shall neither be Directors nor Officers of the Association;

m. Be responsible for causing a written report of the afore-mentioned audit to be handed to each member of the Association in person, or mailed to each member, in advance of the annual meeting of the Association;

n. Appoint a general counsel who shall advise on matters of legal import concerning the Association;

o. Rule on all questions of interpretation of the By-Laws.

10. In addition to the powers provided herein, the Board of Directors shall have such other powers, not inconsistent with these By-Laws or existing statutes, as are necessary for the efficient operation and management of the Association.

11. Informal Action of Directors – Any action required or permitted to be taken at any meeting of the Board of Directors may be taken without a meeting if written consent to such action is signed by all directors (either prior to or following the specific action) and such written consent is filed promptly with the minutes of the proceedings of the Board of Directors.

12. Compensation of Directors – The Directors shall receive no remuneration for their services as directors and shall not otherwise be gainfully employed by the Association.

ARTICLE XI – Officers

1. Selection – At the first meeting of the Board of Directors following the annual meeting of the members of the Association, the Board shall elect officers for the ensuing year. The officers shall be as follows: President (who shall also serve as Chairman of Board of Directors), Vice-President (who shall also serve as the Vice-Chairman of the Board of Directors), Secretary, Assistant Secretary, Treasurer and Assistant Treasurer – each of whom shall serve for one year. No person may hold more than one of these offices at a time, nor shall any person hold the same office for more than two consecutive terms. The President and Vice-President shall be elected from among the Directors. Officers must be members of the Association at the time of their election.

2. Powers and Duties of the President – The President shall preside at all meetings of the members of the Association. He shall have power to sign certificates of membership, to sign and execute all contracts and instruments of conveyance in the name of the Association and to appoint and discharge agents and employees; subject to the approval of the Board of Directors. He shall have general and active management of the business of the Association, and shall perform all duties usually incident to the office of a president. The President shall execute the mandates of the Board of Directors.

3. Powers and Duties of the Vice-President – The Vice-President shall have such powers and perform such duties as may be delegated to him by the President. In the absence or disability of the President, he shall perform the duties and exercise the powers of the President.

4. Powers and Duties of the Secretary – The Secretary shall keep the minutes of all meetings of the Board of Directors, or the members of the Association, and of any other meetings to which the Secretary is designated by the Chairman of the Board of Directors to attend, in books provided for the purpose; he shall attend to the giving and serving of all notices; he shall sign with the President, or with the Vice-President, in the name of the Association, all contracts and instruments of conveyance, and shall affix the seal of the Association thereto; he shall keep charge of the books of certificates of membership, and such other books and papers as the Board of Directors may direct, and he shall perform in general all the duties incident to the office of secretary, subject to the control of the Board of Directors. He shall submit such reports to the Board as may be requested by them.

5. Powers and Duties of the Assistant Secretary – The Assistant Secretary shall have such powers and perform such duties as may be delegated to him by the Secretary. In the absence or unavailability of the Secretary, the Assistant Secretary shall exercise the powers and perform the duties of the Secretary.

6. Powers and Duties of the Treasurer – The Treasurer shall have custody of all funds and securities of the Association which may come into his hands; when necessary or proper he shall endorse on behalf of the Association for collection all negotiable instruments and shall deposit the same to the credit of the Association in such bank or banks as the Board of Directors may designate. Whenever required by the Board of Directors, he shall render a statement of the financial condition of the Association; he shall cause to be entered to be entered regularly in the books of the Association, to be kept for that purpose, a full and accurate account of the Association. He shall perform all

acts incident to the position of treasurer, subject to the control of the Board of Directors.

7. Powers and Duties of the Assistant Treasurer – The Assistant Treasurer shall have such powers and perform such duties as may be delegated to him by the Treasurer. In the absence of unavailability of the Treasurer, the Assistant Treasurer shall exercise the powers and perform the duties of the Treasurer.

8. The Treasurer and Assistant Treasurer shall be bonded in such amount as the Board of Directors may require and the Association shall pay the necessary premiums for such bonds.

ARTICLE XII – General Counsel

1. The Association at all times shall have a General Counsel.

2. The General Counsel must be a member in good standing of the bar of the State of Maryland and a bona fide resident of Montgomery County, Maryland.

3. The General Counsel of the Association shall be appointed by the Board of Directors at their meeting following the annual meeting of the members of the Association.

4. The General Counsel shall advise the Board of all matters of legal import concerning the Association and shall pass upon the papers obligatory of the Association before they are executed by the Association.

ARTICLE XIII – Committee

1. The Board of Directors may provide for such committees as it deems necessary and define their powers and duties.

2. The Chairman and Vice-Chairman shall be members, ex officio, of all committees.

ARTICLE XIV – Notices, Waivers, and Voting

1. Notices to be Mailed – All notices mentioned in these By-Laws shall be mailed to the address of the person entitlted thereto shown on the books of the Association, and the mailing of same, postage prepaid, shall constitute good notice.

2. Waivers of Notice – Whenever any notice whatever is required to be given by law, or under the provisions of the Certificate of Incorporation or of these By-Laws, a waiver thereof in writing, signed by the person or persons entitled to said notice, whether before or after the time stated therein, shall be deemed equivalent thereto unless such waiver is expressly prohibited by law.

3. Voting – At meetings of the members of the Association, each holder of a certificate of membership, duly registered in his name in the books of the Association at least fifteen (15) days prior to any such meeting, may cast one vote. It shall be the duty of the Secretary to prepare and make, at least five (5) days before every election, a complete list of members of the Association entitled to vote and such a list of members of the Association shall be open for inspection by any member and shall be produced at the time and place of such election and kept there until the election is concluded. The President shall appoint inspectors and tellers as required. A nominating committee shall be formed consisting of the four officers of the Board of Directors and one member from each existing standing committee appointed by the Chairman of these committees. A list of nominees shall be distributed to each senior member at least ten (10) days prior to elections. Nominating may also be made by the members

provided said nominations are received by the Secretary or Assistant Secretary at least fifteen (15) days prior to the annual meeting of the Association.

ARTICLE XV – Amendment of By-Laws

1. Amendment by members. A By-Law may be amended or repealed, or a new By-law may be enacted by action of the members of the Association, provided that notice of the proposed amendment, new By-law or repeal is mailed to each member of the Association together with a notice of the meeting at which the proposal shall be considered, and provided further that (a) the proposal shall receive the majority vote of the entire membership present or (b) the vote of the majority of the membership at the meeting and at the next successive meeting.

2. Amendments by Board of Directors – Amendments to these By-Laws may also be adopted by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors at any duly held meeting thereof. Amendments thus adopted shall be effective until and unless they be rejected by a majority vote of the members present and voting at a duly held association meeting. Members shall be given proper notice of any and all amendments adopted by the Board of Directors, such notice to be given within twenty (20) days of adoption of an amendment.

ARTICLE XVI – Miscellaneous

1. Execution of Corporate Papers – All written obligations of the Association shall be executed by the President or the Vice-President and Secretary or Assistant Secretary and shall be solemnized by affixing the Corporation seal. No obligation in writing of the Association failing to have the required signature or the Corporate Seal shall be binding upon the Association, with the exception of the option

for purchase entered into by the President for the pool land.

2. Authority to Execute Papers – No obligation on the part of the Association shall be entered into without the approval of the Board of Directors first hand and obtained except as to matters involving less than One Hundred Dollars (100.00).

3. Corporate Books and Records – Corporate Books and Records shall be open to inspection by members at such time as may be reasonably fixed by the President and such inspection shall take place at the customary place of keeping said books and records.

4. Corporate Seal – The Corporate Seal shall have inscribed thereon the name of the Corporation, the year of its organization, and words "Corporate Seal" and Maryland. The Corporate Seal shall be kept by the Secretary.

5. Annual Report – The Board of Directors shall cause to be prepared and transmitted to each member of the Association, at least twenty (20) days in advance of the annual meeting of the members of the Association, a statement of financial condition of the Association covering the previous fiscal year, and a consolidated balance sheet showing the assets and liabilities of the Association.

6. Dividends and Refunds – There shall be no dividends to members of the Association. There shall be no refunds to members except as may specifically be provided in these By-Laws.

7. Lost Certificate – Any person claiming a certificate of membership to be lost or destroyed shall make an affidavit or affirmation of that fact, whereupon, after the expiration of 30 days from the filing of such affidavit or

affirmation with the Secretary or the Association, a new certificate shall be issued which shall bear on its face language to the effect that the same is a substitute issued in place of a lost or destroyed certificate.

8. Checks of the Association – Checks shall bear the signature of any one of the following combinations of officers: The President plus the Treasurer or Assistant Treasurer; or the Vice-President plus the Treasurer or Assistant Treasurer.

9. Singular Includes Plural, etc. – Wherever in these By-Laws reference is made to the singular or the masculine gender, such reference shall apply to the plural and the female gender with equal force whenever the context requires the same.

10. Acquisition or sale of Land. The Association shall not acquire or dispose of any real property or interest in real property, incumber same, or grant an easement or the like, except in accordance with such approval as may be granted by a majority of the members voting on such proposition at a regular or special meeting of the members.

11. Each person who acts as a Director or Officer of the Association shall be indemnified by the Association against expenses actually and necessarily incurred by him in connection with the defense of any action, suit or proceeding in which he is made a party by reason of his being or having been Director or Officer, except in relation to matters as to be liable for gross negligence or willful misconduct in the performance of his duties.

12. Any question as to the meaning or proper interpretation of any provision of these By-Laws shall be determined by a majority vote of the Board of Directors.

13. Reference herein to age of junior, or associate members shall be the age attained as of January 1st of the current year.

14. For due cause a member may be suspended for a specific period of time or expelled after notice of the basis for such proposed action, a hearing before the Board of Directors, and the affirmative vote of two-thirds (2/3) of the entire membership of that Board. In case of expulsion, the membership shall be disposed of in accordance with the procedure set forth in Article VI. Due cause for suspension or expulsion shall, in general, consist of violation of these By-Laws or rules of the Association or of conduct detrimental to the membership.

15. (a) No beverage subject to tax under Chapter 51 of the Internal Revenue Code of 1954 (distilled spirits, wines, and beer) shall be served or permitted to be consumed on any premises under the control of the Association.

(b) No dining facilities (other than facilities for light refreshment), and no dancing facilities, will be provided on any premises under the control of the Association.

(c) Children are permitted to use the swimming facilities on the basis of their own membership or the membership of the adult.

16. The Association assumes no responsibility, and members (of any class) or their guests can have no claim against the Association, for either personal injury or property loss except to the extent covered by insurance.

APPLICATION NO. B-243
FOR AMENDMENT TO THE
ZONING ORDINANCE TEXT

County Council for Montgomery County
Applicant

OPINION

Ordinance No. 3-28 May 24, 1955

The Council, by this action, sets up the community swimming pools as a special exception, thus giving the Board of Appeals the authority to consider the various applications and the locations of the proposed swimming pools. The Council strongly endorses the interests of the various communities in attempting to organize and promote their own recreational facilities, and believes that the County will be generally benefitted by such development. However, the Council also feels that it is necessary that property owners in the various areas be protected against the invasion of their privacy and against any adverse effects that community swimming pools may have on the residential character of an area. Accordingly, it believes that an opportunity should be afforded such property owners to state their position and opposition, if any, to the construction of a swimming pool in their particular areas. It is also necessary that the Board of Appeals have the opportunity to require various conditions and restrictions on use of a piece of property for a swimming pool. It is believed that in this manner the best interests of the whole community can be served. Furthermore, it is noted that while a requirement that the Board find that construction of a swimming pool will not adversely affect the character of a neighborhood, the Council, at the same time, removes the greater restrictions that exist in section 176-26a of the

Code. The Council also has added the provision which permits the Board of Appeals to require when necessary that a showing of financial responsibility on the part of the applicant must be met. In this way, the Council believes that the development of the community swimming pool movement in Montgomery County will be aided and, at the same time, protection will be afforded to property owners who may be adversely affected by the construction of community swimming pools.

The Maryland-National Capital Park and Planning Commission recommends approval of this text amendment but questions the advisability of making swimming pools a special exception in the industrial zone.

For these reasons, and to aid in the accomplishment of a coordinated, comprehensive, adjusted and systematic development of the Maryland-Washington Regional District, the application will be granted with modifications as discussed above.

* * * * *

A True Copy

ATTEST:

/s/ William B. McKinney
William B. McKinney, Clerk
County Council for Montgomery
County, Maryland

I hereby certify that the foregoing
is a true and correct copy.

/s/ David B. Collier
Clerk, Montgomery County Council

EXCERPTS FROM APPENDIX

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. 33

PAUL E. SULLIVAN, ET AL.,
Petitioners

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL.,
Petitioners

v.

LITTLE HUNTING PARK, INC., ET AL.,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF APPEALS OF VIRGINIA

[27]

* * * * *

EXHIBIT B

LITTLE HUNTING PARK, INCORPORATED
FAIRFAX COUNTY, VIRGINIA

REVISED BY-LAWS

April 18, 1961

ARTICLE I - Name

The name of this organization shall be Little Hunting Park, Incorporated, hereinafter to be referred to as the Corporation.

ARTICLE II - Purpose

The purpose of the Corporation shall be to own (or lease), construct, develop, operate, maintain and manage suitable facilities for the safe and healthful recreation of the Corporation's members, said facilities to include a swimming pool, a park, and such other appurtenances as the Corporation may deem desirable.

ARTICLE III - Membership

Section 1. Membership in the Corporation is–

a. Established by the purchase of a certificate of membership; and

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b. Maintained in good standing by the prompt payment of all charges and assessments; and

c. Limited to persons who reside in, or who own, or who have owned housing units in the subdivisions presently

defined and known as Bucknell Manor, Beacon Manor, White Oaks, and Bucknell Heights, and such other area(s) as may be authorized by the Board of Directors; and

d. Limited to six hundred (600) in number, except that, exclusive of all other provisions herein, there shall be forty (40) memberships available to residents of the subdivision known as White Oaks over and above the number of White Oaks memberships of record as of May 1, 1955.

Section 2. Each application for membership must be made in writing, and must be approved by the Board of Directors. In the sale or resale of memberships by the Corporation, applications by residents of the subdivisions specifically named in Section 1.c. shall be given prior consideration before all others.

Section 3. Each membership in the Corporation shall be issued to one adult person. If said person be a member of a family unit, the membership, maintained in good standing, shall entitle all members of the family unit to utilize the Corporation's facilities. A family unit is defined as all persons of the same immediate family, including all persons dependent on the holder of a membership and who permanently reside in the same housing unit.

Section 4. Irrespective of the type or number of memberships held by one person, no member shall have more than one vote in the affairs of the Corporation.

Section 5. Memberships may be transferred, or assigned for temporary use, as follows:

a. Permanent transfer to another eligible person may be effected.

b. The use of the membership may be temporarily assigned to eligible persons for periods not to exceed one year. Reassignment to such eligible persons is permissible.

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c. Transfers and assignments of memberships must be by written instrument in such form as prescribed by the Board of Directors and are subject to approval by the Board.

Section 6.

a. A membership may, for due cause, and after having been granted an opportunity for a hearing, be suspended for a specified period of time or expelled from the Corporation by a two-thirds (2/3) vote of the entire membership of the Board of Directors.

b. Due cause for suspension or expulsion of a member shall consist of delinquency in payment of any charges and assessments, or of violation of these By-Laws or the Corporation's rules and regulations or of conduct inimicable to the Corporation's members.

c. Suspension or expulsion shall not operate to relieve a member of any liability to the Corporation. In the event of expulsion, the Corporation shall offer the membership for sale at the stated price (Article VI, Section 2.n.). The expelled member shall be paid the balance, if any, of the proceeds of such sale after deducting therefrom any indebtedness due the Corporation, plus a reasonable fee to cover expenses of the sale.

ARTICLE IV - Meetings

Section 1. The annual meeting of the Corporation's members shall be held each year during the month of October at a time and place determined by the Board of Directors.

Section 2. Special meetings of the Corporation's members may be called at any time by the Board of Directors, and shall be called by the Board of Directors within fifteen (15) days of the receipt of the written request of not fewer than twenty (20) members.

Section 3. At least seven (7) days before the date of any annual or special meeting of the members, the Secretary shall cause written notice thereof to be handed to each member in person, or mailed to each member at his address as it

appears on the records of the Corporation. Written notice of a special meeting shall state the purpose of the meeting and no other business may be conducted.

Section 4. Members, in good standing and not suspended, shall be entitled to vote in the affairs of the Corporation as such affairs are brought before a duly held meeting. There shall be not more than one vote per family unit.

Section 5. At an annual or special meeting twenty (20) members eligible to vote shall constitute a quorum. If no quorum is present, an adjournment may be taken to a date not fewer than seven (7) nor more than fifteen (15) days thereafter, and the members present at any such later meeting shall constitute a quorum, regardless of the number of members present. The same notice shall be given for the

later meeting as is prescribed in Section 3 (of this Article) for the original meeting.

Section 6. The order of business at annual meetings shall be:

a. Ascertainment that a quorum is present;

b. Reading and approval (or correction) of the minutes of the last meeting;

c. Report of the Treasurer;

d. Report of the President;

e. Unfinished business;

f. New business;

g. Elections;

h. Adjournment;

Except that the members assembled at any annual meeting may suspend the above order of business upon a two-thirds (2/3) vote of the members present at the meeting.

Section 7. Except as otherwise provided in the By-Laws (Roberts' Rules of Order Revised) shall be observed in the conduct of all meetings.

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ARTICLE V - Board of Directors

Section 1. The Board of Directors shall consist of nine (9) members, all of whom shall be members of the Corporation.

Section 2. The first Board of Directors shall be comprised of three members each elected for a term of one

year, three members each elected for a term of two years, and three members each elected for a term of three years. Thereafter, at each annual meeting, there shall be elected to the Board of Directors three members each for a term of three years.

Section 3. Any vacancy on the Board of Directors shall be filled by a majority vote of the remaining Directors; but the Director so elected shall hold office only until the qualification of a Director who shall be elected at the next annual meeting of the members of the Corporation to complete the unexpired term.

Section 4. If a Director fails to attend regular meetings of the Board of Directors for three consecutive months, or otherwise fails to perform any of the duties devolving upon him as a Director, the Board may, after granting the Director an opportunity for a hearing, declare his office vacant and fill the vacancy as herein provided.

ARTICLE VI - Duties of the Board of Directors

Section 1. The Board of Directors shall meet regularly at least once each month. The time and place of such meetings shall be fixed by the Board. The president, or in his absence the Vice-President, may call a special meeting of the Board of Directors, and shall do so upon the written request of three (3) or more Directors. The Secretary shall cause written notice of all meetings of the Board of Directors to be handed to each member of the Board in person, or be mailed to each at his address as it appears on the records of the Corporation. Whenever any notice whatever is required to be given by law, or under the provisions of the certificate of incorporation or of these By-Laws, a waiver

thereof in writing, signed by the person or persons entitled to said notice, whether before or after the time stated therein, shall be deemed equivalent thereto. For any meeting of the Board of Directors, five (5) Directors shall constitute a quorum.

Section 2. The Board of Directors shall be vested with authority for the general direction and control of the affairs of the Corporation. In addition to the duties customarily performed by Boards of Directors, shall:

a. Act upon all applications for membership;

b. Fix the amount and character of, and approve, surety bonds required of any persons handling or having custody of funds;

c. Fill vacancies in the Board of Directors as herein provided;

d. Employ, fix the compensation, and prescribe the duties of such employees as may, in the discretion of the Board, be necessary;

e. Establish and approve rules and regulations for the safe and convenient use of the Corporation's facilities, and inform all members and other authorized users of the facilities of such rules and regulations;

f. Designate and maintain a registered office and a registered agent;

g. Authorize and supervise investments of the Corporation;

h. Designate the depository or depositories for funds;

i. Fix the amount of all charges and assessments payable by the members of the Corporation, as well as fix the amount of any fees for use of the Corporation's facilities by non-members;

j. Call annual and special meetings of the members of the Corporation, as herein provided, and establish the time and place of such meetings;

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k. Constitute and appoint committees, and define the duties and powers of the same;

l. Cause the books of the Corporation to be audited annually by auditors selected by the Board, such audit to be performed by persons who shall neither be Directors nor Officers of the Corporation;

m. Deliver to each member a written report of the affairs of the Corporation after the end of each fiscal year;

n. Establish, from time time, the stated price at which memberships will be offered for sale or resale by the Corporation.

Section 3. In addition to the powers provided herein, the Board of Directors shall have such other powers, not inconsistent with these By-Laws or existing statutes, as are necessary for the efficient operation and management of the Corporation.

ARTICLE VII - Officers and Their Duties

Section 1. The Officers of the Corporation shall be a President, a Vice-President, a Treasurer, and a Secretary, all of whom shall be elected by the Board of Directors, the

President being elected from their number. Unless sooner removed as herein provided, officers shall be elected at the first meeting of the Board of Directors following the annual meeting of the members, to hold office from January 1st of the next succeeding year, for a term of one (1) year or until the election and qualification of their respective successors.

Section 2. The President shall:

a. Be the administrative officer of the Corporation;

b. Preside at meetings of the members and at meetings of the Board of Directors;

c. Perform such other duties as customarily appertain to the office of President or as he may be directed to perform by resolution of the Board of Directors not inconsistent with these By-Laws or existing statutes.

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Section 3. The Vice-President shall have and exercise all the powers, authority, and duties of the President during the absence or disability of the latter.

Section 4. The Treasurer shall:

a. Have custody of all funds, securities, valuable papers, and other assets of the Corporation, subject to such limitations and control as may be imposed by the Board of Directors;

b. Provide and maintain full and complete records of all the assets and liabilities of the Corporation;

c. Prepare and submit to the Board of Directors, at times specified by same, financial statements showing the progress and condition of the Corporation;

d. Prepare such financial reports and tax returns as are required by law.

Section 5. The Secretary shall prepare and maintain full and correct records of all meetings of the Board of Directors and of the members of the Corporation, including complete returns of all elections conducted in such meetings. He shall give or cause to be given, in the manner herein prescribed, proper notice of all meetings of the members; and he shall conduct all correspondence pertaining to his office.

Section 6. In addition to the specific enumerated duties of Officers as prescribed herein, any Officer shall perform such other duties as customarily appertain to his office or as he may be directed to perform by resolution of the Board of Directors not inconsistent with these By-Laws or existing statutes.

ARTICLE VIII - General

Section 1. The Corporation shall at all times maintain in force planned insurance coverage.

Section 2.

a. Amendments to these By-Laws may be adopted by the affirmative vote of two-thirds (2/3) of the members

of the Board of Directors at any duly held meeting thereof. Amendments thus adopted shall be effective until and unless they be rejected by majority vote of the members present and voting at a duly held Corporation meeting. Members of the Corporation shall be given proper notice of any and all amendments adopted by the Board of Directors,

such notice to be given within thirty (30) days of adoption of an amendment.

b. Amendments to these By-Laws may be adopted by the affirmative vote of two-thirds (2/3) of the members present and voting at a duly held meeting of the Corporation.

Section 3. In addition to any other provision(s) in these By-Laws, any Director or Officer of the Corporation may be removed from office by the affirmative vote of two-thirds (2/3) of the members present at a special meeting held for the purpose, but only after an opportunity to be heard has been given him.

Section 4. When any Officer is absent, disqualified, or otherwise unable to perform the duties of his office, the Board of Directors may designate another member of the Corporation to act temporarily in his place.

Section 5. Reports to the Board of Directors by any duly appointed committee shall be presented in writing, signed by the acting chairman and by the acting secretary, if any, of such committee; and all such reports shall become a part of the permanent records of the Corporation.

Section 6. All books of account, minutes of meetings, committee reports, and other records of this Corporation shall be available to the members of the Corporation.

Section 7. Each member of the Corporation shall be provided with a copy of these By-Laws without specific charge for same.

This is to certify that the attached copy of the revised By-Laws of Little Hunting Park, Inc. is as submitted by the Ad Hoc Committee for By-Laws Revision comprised of

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H. J. Peake, Chairman, L. M. Courson, and W. D. Lincicone, as such revision was considered, revised further and adopted by the Board of Directors at a regular monthly meeting, held at 921 Cornell Drive, Alexandria, Virginia, on April 18, 1961, and the same is duly recorded in the minutes of the said meeting of that date.

/s/ John R. Hanley
President

Attested:

/s/ Betty A. Armstrong
Secretary

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* * * * *

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[1] VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL E. SULLIVAN, et al.,
Plaintiffs,
v. In Chancery No. 22751

LITTLE HUNTING PARK, INC.,
et al.,
Defendants.

Fairfax, Virginia
Wednesday, March 22, 1967

The above-entitled matter came on for hearing before Judge JAMES KEITH, in Courtroom No. 3, Wednesday, March 22, 1967, at 10:00 o'clock, A.M.

APPEARANCES:

Robert M. Alexander, Esquire
Allison W. Brown, Esquire, and
Peter A. Eveleth, Esquire,
for the Plaintiffs.

John Charles Harris, Esquire,
for the Defendants.

* * *

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[7] PAUL E. SULLIVAN

plaintiff, was called as a witness in his own behalf, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN:

Q. Will you state your name and address, please? A. Paul E. Sullivan, 7113 Coventry Road, Alexandria, Virginia.

Q. What is your occupation? A. I am an analyst for the Defense Department.

Q. Are you married, Mr. Sullivan? A. I am married.

Q. How many children do you have, and what is their age range? A. I have seven children. They range from two and one-half to sixteen.

Q. Will you state how you first became a member of the Little Hunting Park, Inc. and at what time? A. Well, we moved into Bucknell Manor, in the house that is now

6810 Quander Road in the last month of 1950, and in May, 1955, when Little Hunting Park, Inc. was being formed, we purchased a share so our children would be able to make use of the facilities of Little Hunting Park, and I retained that membership to this point. Later, we moved from—

[8] Q. Just one second. That share you purchased for what price? A. I believe it was $150.00.

* * * * *

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[182] VIRGINIA MOORE

was called as a witness on behalf of the plaintiff, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. EVELETH:

Q. Would you please state your name and address? A. Virginia Moore, 6417 Olmi-Landrith Drive, Alexandria, Virginia, in Fairfax County.

Q. Mrs. Moore, were you president of Little Hunting Park during the entire year of 1965? A. I was.

Q. Were you a member of the board of directors during that entire period? A. I was.

Q. Have you held any other positions or offices with Little Hunting Park, Inc.? A. I was a member of the board of directors for four years. I was assistant treasurer two years, and vice president for one year, and president for one year.

Q. Could you give me the years? Do you remember? A. It was just previous. It was consecutive until [183] 1965. The first two years I was assistant treasurer. The third, I was vice-president, and the fourth year I was president.

* * * * *

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Q. How many times have applications for membership in Little Hunting Park been denied by the board of directors from its incorporation to the present? A. I do not know. Q. I show you Answer 5 to the interrogatories.

THE COURT: She said she did not prepare that.

MR. EVELETH: She may be aware of this fact though, [198] You may refresh your recollection. She must have known. She was vice president and president and everything else.

THE WITNESS: I still did not have the records.

BY MR. EVELETH:

Q. Are you aware of any? A. Any what?

Q. Any denials of membership applications. A. No, I am not.

Q. The answer to the interrogatory stated—

THE COURT: I don't think that is evidence. That was asked for your information and in the preparation of the case. Isn't that right?

MR. EVELETH: I feel it is an admission on the part of the corporation.

THE COURT: You can't prove it by this witness, apparently.

MR. EVELETH: It is an admission by the corporation. She is a member of the corporation. She is liable.

THE COURT: I don't think it is the right way to do it. If you want to read it into the record, and Mr. Harris doesn't object. Do you want it into the record?

MR. HARRIS: I don't know what he is going to do.

MR. EVELETH: (Reading) "The records of the corporation do not always reflect denial of membership. However, in May, 1961 an application was denied but the record does not disclose the [199] reason for such denial. And in our interrogatories, we asked how many applications

were denied for membership, and we asked for the dates, the times and under what circumstances and for what reason.

* * * * *

[161]

* * * * *

VIRGINIA MOORE

defendant, was recalled as a witness, and testified further as follows:

DIRECT EXAMINATION

BY MR. HARRIS: ***

[163]

* * * * *

Q. Do you know how many members you have in Alexandria City? A. In Alexandria City, there are, I think, about eleven, sixteen on here.

[302] Q. How many do you have that are not in the area specified in the bylaws and Alexandria City? How many are out of those two areas?

MR. EVELETH: I must object. I feel she is reading from that thing. She should use her recollection.

THE COURT: I believe she prepared it.

MR. EVELETH: I object. I don't think he has laid a proper foundation. He hasn't shown where she got that information from.

THE COURT: She made a study.

MR. EVELETH: It doesn't mean anything to me.

THE COURT: You may cross examine on it.

[164]

BY MR. HARRIS:

Q. How many outside the area? A. 117.

* * * * *

[205]

VIRGINIA [1]

IN THE CIRCUIT COURT OF
FAIRFAX COUNTY

THEODORE R. FREEMAN, JR.,
et al,

Plaintiffs,

vs. In Chancery No. 22752

LITTLE HUNTING PARK, INC.,
et al,

Defendants.

Fairfax, Virginia
Wednesday, April 12, 1967

* * * * *

[216]

* * * * *

[41] PAUL E. SULLIVAN

was called as a witness on behalf of the plaintiffs, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BROWN: ***

[219]

* * * * *

Q. Mr. Sullivan, in your examination of the membership records of the corporation, did you make any observations about the places of residence of the current members of the association? A. Yes, I did.

Q. Are you familiar with the four subdivisions that are [47] specified in the bylaws as constituting the area from which members are eligible? A. Yes.

Q. Are you also familiar with any expansions that have taken place in this area of eligibility? A. I am familiar with the expansion through 1965.

Q. Would you explain the basis, the area of eligibility from which the association draws its members? A. The area of eligibility is the area within which a person must live in order to purchase a share and as a stimulus for the purchase of shares by eligible persons, the privilege of being a guest to a member is denied to non-members in the area of eligibility. As a member who occasionally took guests, I maintained a current idea of what the area was because I did not want the people turned down.

Q. Has the area of eligibility been expanded from time to time? A. Yes, sir.

Q. By what means? A. The board of directors has ex-

[220]

tended the area of eligibility from the four subdivisions to the areas contiguous, and at this point they extend, as of 1965, they extended in a rather loaf shape around the pool

grounds, extending out, I would say, from the farthest point to about [48] a mile, a mile and a quarter or a mile and a half, and I don't believe there is anything beyond that.

Q. How do you know this fact about the size of the area? A. As I say, as a member this is made known.

Q. Did you ever examine corporate records? A. In 1965, when I was trying to find out the reasons and basis for the board's action, which I considered to be inimicable to my interest, I exercised my right under the bylaws to examine corporate records once and proceed again. I was later not permitted to do this. This was quite contrary to the bylaws, but in the minutes as I can recollect them, as I reviewed them, it was made very clear that this line of eligibility in which people could buy memberships if they so desired, and the line if they were not permitted to be guests, extended from the property of Little Hunting Park down past behind White Oaks, down to an area I called Stonehedge, past the high school.

Q. What high school? A. Groveton, beyond a parking lane to a ramp northwest and swinging down in an irregular area to along Oak Drive, but including both sides of that street, and down Beacon Hill Road and south to Quander Road and swinging down to Mount Vernon Boulevard and swinging south on Mount Vernon Boulevard and up to Rollins Drive and the houses on [49] both sides to Little Hunting Park. This line actually touched the property line of the corporation.

Q. In examining the membership records, did you make a count or a tally of the number of persons whose current residences are shown as being within the area of eligibility? A. Yes, I made some notes.

Q. Will you tell us how many persons you determined lived within the area of eligibility of current memberships?

A. According to the cards I have now, there are 424 members who live now within the area of eligibility.

[221]

Q. How many persons, total number of persons, live presently outside of the area of eligibility? A. Total number outside is about 117.

Q. 117? Do the records reflect persons who moved or persons who lived within the area at the time they bought their membership shares and subsequently moved? A. Yes, the original address is lined out and this new address is written in. The original address for 92 of these 117 people were within the area of eligibility.

Q. These show that they later after buying their shares, later moved outside of the area of eligibility? A. Yes, and this would be in accordance with the bylaws.

Q. Do the records show further down how many people at the time they purchased their shares, lived outside of [50] the area of eligibility? A. It would appear that there could be as many as 25. Maybe some of these cards are replacements for previous cards, if a card got too worn, but I would say that 25 would be the maximum number of people who lived outside the area.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

INTERROGATORIES

Plaintiffs request that defendants answer separately and fully in writing under oath, pursuant to Rule 33 of the

Federal Rules of Civil Procedure, the following interrogatories, and that, within 15 days after service of these interrogatories upon them, they file the original of their answers with the Clerk of this Court and serve a signed copy of their answers upon Raymond W. Russell, 22 West Jefferson Street, Rockville, Md. 20850, attorney for the Plaintiffs. These interrogatories shall be deemed continuing until the time of trial.

1. Do you admit that the recreation facilities of Wheaton-Haven Recreation Association, Inc. (hereinafter "Wheaton-Haven") were constructed in 1958-1959 under a special exception granted on September 20, 1958, by the Montgomery County Board of Appeals, pursuant to the zoning ordinance of the Montgomery County Code?

2. Do you admit that the provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955?

3. Do you admit that in Ordinance No. 3-28, dated May 24, 1955, the Montgomery County Council stated ". . . this action sets up the community swimming pools as a special exception . . . The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."?

4. Do you admit that at the public hearings conducted in August 1958 by the Montgomery County Board of Appeals on Wheaton-Haven's application for a special exception, Wheaton-Haven's witnesses testified, in effect, as follows: the County was unsuccessfully approached to construct a pool, that in lieu of County action promotors of

Wheaton-Haven initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large? [Attach to your answers to these interrogatories a verified copy of Wheaton-Haven's application for the special zoning exception referred to in this interrogatory, along with verified copies of any letters or briefs submitted in support thereof.]

5. Do you admit that prior to granting the special exception, the Montgomery County Board of Appeals required Wheaton-Haven to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed?

6. Do you admit that during 1958, the promotors of Wheaton-Haven conducted an extensive membership drive in surrounding neighborhoods and communities, that a circular was published and distributed advertising the projected construction of the association's recreation facilities, and that on July 9, 1958, an open meeting was conducted by the promotors in the Civic Auditorium of the Maryland-National Capital Park and Planning Commission, a governmental agency? If you deny part of this interrogatory, indicate what part you admit.

7. Do you admit that Wheaton-Haven is exempt from and does not pay federal or state income taxes under the provisions of the United States Internal Revenue Code, Section 501(c)(7), and Maryland Code, Art. 81, Sec. 88(g)(8)?

8. List and explain the nature of each and every licensing, inspection or regulatory law, ordinance or regulation

currently applicable to the recreation facilities operated by Wheaton-Haven that is not also generally applicable to all persons or property owners.

9. State the name and business address of the contractor and each and every subcontractor who worked on the construction of Wheaton-Haven's recreation facilities.

10. State the 15 major items (both manufactured and raw materials) used in the construction of Wheaton-Haven's recreation facilities, the name and address of the company from which they were purchased and, if different from the supplier, the name and address of the manufacturer or original producer.

11. State whether Wheaton-Haven's recreation facilities have been serviced, maintained or repaired at various times since their construction by contractors or subcontractors engaged for this purpose. Also state the name and business address of each and every such contractor or subcontractor.

12. State all products and supplies (both manufactured and raw materials) used by every contractor or subcontractor listed in the answer to the next preceding question for the purpose of equipping, servicing, maintaining or repairing Wheaton-Haven's recreation facilities, the name and address of the company from which such equipment, products and supplies were purchased, and, if different from the supplier, the name and address of the manufacturer or original producer.

13. In addition to the products and supplies listed in the answer to the next preceding question, list all other equipment, products and supplies that have been used, or are used, in equipping, servicing, maintaining or repairing

Wheaton-Haven's recreation facilities, the name and address of the company from which such equipment, products and supplies were or are purchased and, if different from the supplier, the names and address of the manufacturer or original producer.

14. State whether any food, beverage or non-food products are available for sale on Wheaton-Haven's premises. If the answer is affirmative, also answer the following:

(a) State each and every product and the value of sales of each and every product in 1968 and 1969.

(b) State the name and address of the supplier of each and every product and, if different from the supplier, the name and address of the manufacturer or original producer.

15. State the total number of Wheaton-Haven members as of March 1, 1968.

16. State each and every change in the list of members of Wheaton-Haven from March 1, 1968, through December 31, 1968, showing in connection therewith the following:

(a) The date of such change;

(b) The name and address of the individual involved;

(c) Whether the change was a termination of membership or the admission of a new member, and if the latter, whether it was a regular membership or a temporary membership;

(d) In the case of each and every admission to membership during the period specified, state the date when such person had formally applied for membership in Wheaton-Haven.

17. State the name and address of each and every person who has ever been denied membership in or an application for membership in Wheaton-Haven and the reason therefor.

18. State the name and address of each and every person who served on the board of directors of Wheaton-Haven during 1968, the period during which each person served, and the office each person held, if any.

19. State for the year 1969, the same information requested in Question 18.

20. State for the year 1970, the same information requested in Question 18.

21. State for the years 1968, 1969 and 1970, respectively, the name and address of Wheaton-Haven's membership chairman or membership committee chairman.

22. State the name and address of each and every person having custody of corporate records of Wheaton-Haven, including minutes of membership meetings, minutes of board of directors meetings, financial records, membership records, and guest records. Identify the person having custody of each type of record.

23. Do you admit that during 1968, Dr. and Mrs. Harry C. Press attempted to obtain membership in Wheaton-Haven?

24. State in what capacity Mr. Brian Carroll was authorized to act on behalf of Wheaton-Haven in 1968.

25. State in what capacity Mr. Philip S. Trusso was authorized to act on behalf of Wheaton-Haven in 1968.

26. Do you admit that during 1968, Mr. Brian Carroll, or Mr. Philip S. Trusso, or any other person or persons acting on behalf of Wheaton-Haven, refused to supply Dr. and Mrs. Harry C. Press with the appropriate application for membership, or otherwise acted in such a manner as to deny or discourage their membership in Wheaton-Haven?

27. If the answer to the next preceding question is in the affirmative, name each and every person who so refused and state the reason or reasons for the refusal.

28. State whether in 1968, it was the practice or policy of Wheaton-Haven not to admit Negroes to membership.

29. State whether in 1968, it was the practice or policy of Wheaton-Haven not to admit Negroes to its facilities as the guests of members.

30. State whether at the present time it is the practice or policy of Wheaton-Haven not to admit Negroes to membership.

31. State whether at the present time it is the practice or policy of Wheaton-Haven not to admit Negroes to its facilities as the guests of members.

32. List each and every meeting of the board of directors and membership of Wheaton-Haven held in 1968, 1969 and 1970 at which consideration was given to the practice or policy of the association regarding the admission of Negroes to membership, or their admission to the association's facilities as the guests of members. With respect to each such meeting, also answer the following:

(a) Describe specifically the question or questions considered with respect to Negroes and the resolution thereof;

(b) If the meeting was of the board of directors of Wheaton-Haven, list each and every director who was present;

(c) [Attach to your answers to these interrogatories verified copies of all resolutions, reports, or other

materials which record consideration at the meeting of the practice or policy described in Question 32.]

33. Do you admit that at a meeting of the board of directors of Wheaton-Haven held on July 20, 1968, a motion was passed providing that henceforth guests using the association's facilities were to be limited to relatives of Wheaton-Haven members?

34. If the answer to the next preceding question is in the affirmative, do you admit that a reason for the adoption of the guest policy on July 20, 1968, was to prevent members from bringing Negroes as guests?

35. Do you admit that since July 20, 1968, no Negro has been permitted to use Wheaton-Haven's facilities as the guest of a member?

36. Do you admit that Wheaton-Haven has no Negro members?

37. Do you admit that there are Negro families residing within the geographic area from which Wheaton-Haven draws its members?

38. [Attach to your answers to these interrogatories, verified copies of the minutes of all Wheaton-Haven board of directors and membership meetings held in 1968, 1969 and 1970.]

Submitted by,

Raymond W. Russell
22 West Jefferson Street
Rockville, Md. 20850

Allison W. Brown, Jr.
Suite 501, 1424 – 16th Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

ANSWERS TO INTERROGATORIES

The Defendants, Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, say:

8. We do not have the vaguest idea how to answer this question. We are not qualified to explain the nature of laws, ordinances, or regulations.

9. Gillespie and Company, Falls Church, Virginia. We are not aware of the names of the sub-contractors used.

10. This information would only be available from the contractor.

11. Durite Chemical Company, Inc., 3564 Bladensburg Road, Brentwood, Maryland, caulked the deck.

12. Durite Chemical Company, Inc.

13. Durite Chemical Company, Inc.

14. Candy and icecream are sold, and were purchased through Rockville Vending Machine Company and the Good Humor Ice Cream Company. These two companies have the amount sold.

15. Three Hundred Twenty-Five (325) families.

16. May, 1968, Three (3) new members. Henry Hallerman, regular membership. David Berry, regular membership.

Robert Larson, regular membership. December, 1968, 12 resignations. Robert Reeves, Jean Williams, Robert O'Neil, James Watkins, Martin Margolis, Andrew Goldstein, Marshall Becker, Bernard Leese, William J. Smith, William Horn, Maurice Kane, Michael Mendelaska.

17. Mrs. Lewis Papier, 12609 Laure Drive, Silver Spring, Maryland.

18. Mr. Philip Trusso, President
Mr. Robert Sager, Vice President
Mr. Bernard Katz, Treasurer
Mrs. Ellen Fenstermaker, Secretary
Mr. Robert Lane
Mr. Ernest McIntyre
Mr. Anthony DeSimone
Mr. Albert Friedland
Mr. James Welch
Mrs. June Hooks
Mrs. Lois Carrico (Resigned June 1968)
Mr. William Becker
Mrs. Joann Bennington
Mr. Sidney Plitman
Mr. James Whittles
Mr. Albert Timmons (Replaced Mrs. Carrico June 1968)

19. Mr. Bernard Katz, President
Mr. Robert Lane, Vice President
Mr. Brian Carroll, Treasurer
Mrs. Helen Abate, Secretary
Mr. Philip Trusso
Mr. Walter Smith
Mr. Albert Friedland
Mr. Anthony DeSimone
Mr. James Welch

Mr. Ernest McIntyre
Mr. William Becker (Resigned Jan. 1969)
Mr. Sidney Plitman
Mr. James Whittles
Mrs. Ellen Fenstermaker
Mrs. JoAnn Bennington (Resigned April 1969)
Mrs. Helen Abate (Replaced Mr. Becker March 1969)
Mr. Milton Rodes (Replaced Mrs. Bennington May 1969)

20. Mr. Bernard Katz, President
Mr. Ernest McIntyre, Vice President
Mr. Leonard DeMino, Treasurer
Mrs. Helen Abate, Secretary
Mr. Walter Smith
Mr. Albert Friedland
Mr. Sidney Plitman
Mr. James Whittles
Mr. Milton Rodes
Mr. Clarence Melcher
Mr. Anthony DeSimone
Mrs. Ellen Fenstermaker
Mr. Brian Carroll
Mr. James Welch
Mr. Robert Lane

21. None.

22. Mrs. Anthony Abate has the Minutes of the Corporation. Anthony J. DeSimone has the financial records, and Bernard Katz has the membership records. Guest lists are kept for one year only.

24. None.

25. President.

26. This is not a question framed for the purposes of discovery, but is rather a request for admissions of fact.

27. Does not apply.

28. We did not have a written policy but we did have an understanding to discourage negroes because we considered ourselves a private pool.

29. Same as No. 28.

30. Same as No. 28.

31. Same as No. 28.

33. Yes.

* * * * *

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

REQUEST FOR ADMISSION

Plaintiffs request defendants Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, within 10 days after service of this request, to admit, for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of the following facts:

1. The recreation facilities of Wheaton-Haven Recreation Association, Inc. (hereinafter "Wheaton-Haven") were constructed in 1958-1959 under a special exception granted on September 20, 1958, by the Montgomery County Board of Appeals, pursuant to the zoning ordinance of the Montgomery County Code.

2. The provision of the zoning ordinance applicable to Wheaton-Haven was enacted by the Montgomery County Council as Ordinance No. 3-28, dated May 24, 1955.

3. In Ordinance No. 3-28, dated May 24, 1955, the Montgomery County Council stated ". . . this action sets up the community swimming pools as a special exception . . . The Council strongly endorses the interest of the various communities in attempting to organize and promote their own recreational facilities and believes that the County will be generally benefited by such development."

4. At the public hearings conducted in August 1958 by the Montgomery County Board of Appeals on Wheaton-Haven's application for a special exception, Wheaton-Haven's witnesses testified substantially as follows: The County was unsuccessfully approached to construct a pool, that in lieu of County action promotors of Wheaton-Haven initiated efforts to serve the imperative recreational needs of the community, that the pool was needed for youths as a deterrent to juvenile delinquency, that the pool was not intended for private social functions, and that the construction of the pool would be advantageous and a public benefit to the community at large.

5. Prior to granting the special exception, the Montgomery County Board of Appeals required Wheaton-Haven to demonstrate that sixty (60) percent of the projected construction costs were obligated or subscribed.

6. During 1958, the promotors of Wheaton-Haven conducted a membership drive in surrounding neighborhoods and communities, in connection with which a circular was published and distributed advertising the projected construction of the association's recreation facilities.

7. As part of the Wheaton-Haven membership drive, on July 9, 1958, an open meeting was conducted by promotors in the Civic Auditorium of the Maryland-Nation Capital Park and Planning Commission, a governmental agency.

8. Wheaton-Haven is exempt from and does not pay Federal or state income taxes under the provisions of the United States Internal Revenue Code, Section 501(c)(7), and Maryland Code, Art. 81, Sec. 88(g)(8).

9. During 1968, Dr. and Mrs. Harry C. Press attempted to obtain membership in Wheaton-Haven.

10. At a meeting of the board of directors of Wheaton-Haven held on July 20, 1968, a motion was passed providing that henceforth guests using the association's facilities were to be limited to relatives of Wheaton-Haven members.

11. A reason for the board of directors' adoption of the guest policy on July 20, 1968, was to prevent members from bringing Negroes as guests.

12. Since July 20, 1968, no Negro has been permitted to use Wheaton-Haven's facilities as the guest of a member.

13. Wheaton-Haven has no Negro members.

14. There are Negro families residing within the geographic area from which Wheaton-Haven draws its members.

Submitted by,

Raymond W. Russell
22 West Jefferson Street
Rockville, Md. 20850

Allison W. Brown, Jr.
Suite 501, 1424 - 16th St., N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

ANSWER TO REQUEST FOR ADMISSION

The Defendants, Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, in answer to Request for Admission, say:

1. Admitted.

2. Admitted.

3. We have no knowledge as to what the Montgomery County Council stated on the date mentioned.

4. We have no knowledge as to what Wheaton-Haven's witnesses substantially testified to some twelve years ago.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Denied.

12. Denied. We certainly are not on the pool premises for the entire period during which it is open each day, and for the entire summer, and thus have no knowledge as to the race of every person who has used the pool for almost two years.

13. Admitted.

14. Admitted.

Henry J. Noyes
Attorney for Defendants

[Certificate of Service]

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MURRAY TILLMAN, et al, Plaintiffs vs WHEATON-HAVEN RECREATION ASSOCIATION, INC., et al, Defendants	Civil Action No. 21,294

Silver Spring, Maryland

Monday, March 23, 1970

Deposition of

ERNEST E. MC INTYRE

a defendant, called for examination by counsel for plaintiffs, pursuant to notice, taken at 9525 Georgia Avenue, beginning at 2:10 o'clock p.m., before Thomas C. Melo, a Notary Public in and for the State of Maryland, when were present on behalf of the respective parties:

2 For the Plaintiffs:

ALLISON W. BROWN, JR., ESQ.
and
RAYMOND W. RUSSELL, ESQ.
by
ALLISON W. BROWN, JR., ESQ.

For the Defendants:

H. THOMAS HOWELL, ESQ.
and
HENRY NOYES, ESQ.
by
H. THOMAS HOWELL, ESQ.

Also present: Samuel A. Chaitovitz, Esq.
and
MURRAY TILLMAN

– – –

3 PROCEEDINGS

MR. BROWN: Would you enter as another appearance on this the local Maryland counsel, although he is not here Raymond W. Russell, Esquire, 22 West Jefferson Street, Rockville, 20851.

Mr. Henry Noyes, counsel for the Wheaton-Haven Recreation Association, Inc., and other defendants in this proceeding, was notified of this deposition taking and the various continuances that have been necessary, and he was notified, most recently this morning, of the fact that the deposition would be taken this afternoon. His secretary indicated that she did not think he would be able to be here.

Thereupon

ERNEST R. MC INTYRE

a defendant, called for examination by counsel for plaintiffs and, after having been first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. BROWN:

Q. Will you state your name, please? A. Ernest Richard McIntyre.

Q. And your address? A. My residence?

4 Q. Yes. A. 10403 Amherst Avenue, Silver Spring, Maryland.

Q. What is your occupation? A. I am an attorney.

Q. Are you a member of Wheaton-Haven Recreation Association, Incorporated? A. Yes.

MR. BROWN: As we proceed with this we will refer to the Association as Wheaton-Haven so there won't be any misunderstanding.

MR. HOWELL: Agreed.

BY MR. BROWN:

Q. How long have you been a member? A. I think since the early part of 1967.

Q. Are you now, or have you in the past, held office in the Association, or been a member of the Board of Directors? A. I am a member of the Board of Directors, and I believe I was elected in the fall, in November of 1967, for a three year term. And I am presently, as of January or December past, Vice President of the Association.

Q. Did you have any office in 1968? A. None, other than as a member of the Board of Directors.

5 (Discussion off the record.)

BY MR. BROWN:

Q. It has been called to my attention you may have misspoken. You became Vice President in – state it again. A. I am the current Vice President of the Association, having been elected to that post either in January of 1970 or December of 1969. I don't recall when that organization meeting took place.

Q. Are you familiar with the policy of Wheaton-Haven with respect to the membership policy as regards Negroes?

MR. HOWELL: Objection in as far as it is assumed there is such a policy. You may answer it.

MR. BROWN: Well, I can rephrase it.

BY MR. BROWN:

Q. Are you familiar with any practices or policies that Wheaton-Haven has followed with respect to membership for Negroes? A. What are you talking about?

Q. Well, do you know whether Wheaton-Haven has now, or has had in the past, a practice or policy of denying membership to Negroes? A. The policy at present is, I think, the policy of denying admission to Negroes, said
6 policy having been established by a vote of the general membership in November of 1969. The current policy is that – well, I will answer that question this way – at the November, 1969 meeting the resolution was presented to the general membership to admit members without regard to race, creed, color, et cetera. That resolution was defeated by the general membership in that meeting of November, 1969.

Q. What was the policy in this respect in 1968? A. I believe it was the same policy.

Q. Do you know when that policy had been formulated? A. No.

Q. Or established? A. No.

Q. When you speak of the same policy, you mean that in 1968 there was the same policy of denying membership to Negroes? A. Yes.

Q. Now, going back to 1968, since that is the period that we are concerned with here when the discrimination occurred as alleged against the plaintiffs in this suit, was there discussion in 1968, or about the time that these events occurred, concerning the membership policy for Negroes?

7 MR. HOWELL: Would you place this in reference to before the event or after, or what?

MR. BROWN: All right.

BY MR. BROWN:

Q. Maybe we better start with the Presses. Are you acquainted or do you know who Dr. and Mrs. Harry Press are? A. Yes.

Q. Do you know whether they made application for membership in 1968, or sought to obtain membership? A. Yes.

Q. Do you know what action was taken with respect to their effort to obtain membership in 1968? A. Well, I can't answer that specifically. I mean, to the precise answer to the precise question, I can't tell you exactly what that is. I can give you some background on that.

Q. Would you do that? A. Like I say, I am acquainted with Dr. and Mrs. Press, primarily through their son. I knew their son before I knew the two of them because the youngster played on a softball team that I coached. Then I got to know Dr. Press from coming to the ballgames. I understood that he was interested in joining the pool. I made an inquiry to the Board of Directors with

8 regard to his membership. This was an informal inquiry. It was not at an organized directors' meeting. I was informed, again informally, without any specific action of

the directors, that they were not in favor of such an application.

Q. Can you place this in terms of time? A. It must have been in the spring or early summer of 1968.

Q. All right. A. I so informed Dr. Press that it didn't look particularly favorable with regard to his application, or with respect to his seeking membership. There came a time when Dr. Press informed me that he intended to seek some judicial, or some other remedy. I think he had in mind a complaint to the Human Relations Commission of the County. I discussed it with him at that time. And I told him at that time that I thought that he might be a bit premature for two reasons. No. 1, at that particular time the pool membership was full. And that they were not admitting anybody. And that I felt that a membership policy would be the subject of the general membership meeting which is held in November of 1968. And that under any circumstances he could not be admitted for the swim season of 1968. And that if the policy
9 was changed there might be a more friendly environment to his admission if the policy was in fact changed at the following meeting, and he wouldn't be gaining anything or losing anything timewise due to the fact the membership was full. I think he agreed to so wait. And then at that general membership meeting it was apparently the feeling or the intention of the general membership that it should not be opened to Negroes. And I think a short period of time after that is when he instituted certain action before the Human Relations Commission. Within a few days after the vote was announced of the November meeting.

Q. Does the Association maintain a waiting list of persons wanting membership even though the membership may be full at a given time? A. If the membership is

full at a given time, then they do maintain such a list, I believe. Of course, if the membership is not full, you get an application and you take his money.

Q. At the time you spoke to Dr. Press about this, and you told him that the membership was full, would it not have been possible for him to have gotten on a waiting list? Assuming the membership was full at the time.

A. Now, I was not directly involved with membership.

10 Q. I understand that. A. So I can't answer yes or no to that. I would believe that he would be. I would believe that an applicant would be assigned to some waiting list. But I don't know.

Q. Do you know in what capacity Mr. Brian Carroll represented Wheaton-Haven in 1968? A. I do not believe that he was representing the pool in any capacity at that time.

Q. Was he on the Board of Directors at that time?

A. No.

Q. He wasn't? A. I don't think so.

Q. Do you know whether he was membership chairman at the time? A. I don't believe he was. He is currently on the Board of Directors. He is currently now. When he was elected, I can't tell you. I think it may have been in November of 1968 when he was elected.

Q. Do you know whether he was membership chairman in 1968? A. I do not believe that he was.

Q. In what capacity if any did Mr. Philip Trusso represent Wheaton-Haven in 1968?

11 A. He was the President.

Q. When you learned that the Association was not in favor of Dr. Press' application, or being a member, who told you this? A. I don't think anybody.

MR. HOWELL: Let me clarify this question. Are you referring to the informal inquiry?

MR. BROWN: The informal inquiry.

MR. HOWELL: I want to clarify it.

THE WITNESS: I don't think anybody told me specifically with regard to Dr. Press. Discussions I had were with regard to Negroes generally.

Q. And about how many people on the Board of Directors did you discuss it with? A. Three or four, I guess.

Q. Including Mr. Trusso? A. Now, I just don't recall whether I asked him specifically or not, whether I discussed it with him or not. I discussed it with people who were not on the Board of Directors, too, who may have had some information or background.

Q. Did you discuss it with the membership chairman at that time?

12 A. I don't know who the membership chairman was.

Q. Is it customary to have a membership chairman who is a member of the Board or who may not be a member of the Board, or what is the procedure? A. I am not trying to be evasive, Mr. Brown. I just don't know. It seems to me when we first started the membership was so full there was no need for a membership chairman. In my first exposure to this pool.

Q. Do you know whether Dr. Press made any further efforts in '68, beyond those you have described, to get membership. In other words, other than talking to you about the matter, and other than later on in the year, in the latter part of the year, beginning legal proceedings? A. I have no personal knowledge that he did. It is my understanding that he did. It is completely hearsay. I have no personal knowledge.

Q. What is the basis for your understanding? A. Dr. Press told me a few things, certain members of the Board have told me a few things.

Q. What members of the Board specifically did you talk to about this and what did they say to you? A. I discussed it first, I believe, with an individual whose name slips my mind who was Treasurer at the time.

13 Q. Is he one of the defendants in the proceedings? A. No, he isn't. I will tell you who he is, Sager, S-A-G-E-R. And I may have discussed it with his wife. I may have called his home to speak to him, and rather than – he may have been absent, or something, and I spoke with Mrs. Sager in that regard, who has been a member of the pool for a much longer period than I have.

Q. Mr. Sager, or Mrs.? A. Mrs. – well, both of them have been members for a while. Husband and wife. She explained certain policies to me. I may have discussed it with Mr. Trusso, perhaps, I am not real sure, or I may have brought it up when three or four of them were present. The precise number, or the precise individuals, I don't know. I got the feeling – I was sort of taking a pulse of the Board of Directors without making a formal resolution to the Board.

Q. At the time that Mr. Trusso was President, what was Mr. Sager? A. I think he was Treasurer.

Q. Do you know his full name? A. Robert Sager.

Q. Was any action taken at any Board of Directors meeting in 1968 with respect to Dr. Press' effort to obtain

14 membership in the pool? A. I don't think so.

Q. Do you have minutes of the Board of Directors meeting in 1968? A. The pool keeps them. I don't have them.

Q. Do they distribute them to members of the Board? A. No.

Q. Would the minutes reflect whether such a discussion had taken place? A. My impression of the minutes are that they are reasonably accurate, written memo of what took place at the meetings.

Q. Do they reflect votes that are taken? A. They don't reflect individual votes, no, unless somebody asks that they be recorded.

Q. By individual votes, they don't reflect how individual directors vote, is that what you mean? A. No.

Q. Do they reflect normally when a vote is taken and by what margin it goes? A. No, it reflects the mover and the seconder, and then the vote. I mean, there are certain votes where I have asked that my vote be recorded.

Q. Did any such vote occur in 1968? A. I don't believe so.

Q. Moving forward then from 1968, what further discussions have occurred, on an informal basis where you have been involved, or Board meetings where you have been involved, relating to the membership policy of Wheaton-Haven as it affects Negroes? A. Well, it was the subject of the general membership meeting in 1968. And there was a vote taken at that time which was interpreted as reflecting a policy of the pool not to admit Negroes. I don't know what the precise wording of the resolution was, or what it said. But it was to that effect. Subsequent to that, of course, we got into the complaint filed by Mr. Tillman and Dr. Press with the Human Relations Commission. Then there was a general discussion, I would suppose, among – certainly it was discussed, this complaint. The question of the hearing on these complaints, there was a hearing set, and there was a decision by the Board – nobody seemed to know just how to respond to these hearings, and what have you. I shouldn't say that either. That is not exactly accurate. But there was a general discussion as to what to do with regard to these particular complaints before the Human Relations Commission.

There seemed to be a general feeling that if the community swimming pool were in fact places of public accommodation, then that would be the answer to the question. Then the

law applied, and then Negroes should be admitted. I think it was the feeling of the Board of Directors that that question should be judicially determined, maybe raised as a defense to whatever actions the Tillmans and Presses brought in this regard. Then there seemed to be the question of how to get to this question. And I raised the question, or I raised a possible solution at a Board of Directors' meeting that if we could seek a declaratory judgment with regard to precisely whether a community pool was within the four corners of the public accommodations ordinance, that would answer everybody's question. And it was then determined that such an action should be sought. And I think then an attorney was hired to bring such an action. Unfortunately it never got to be determined. I think after that declaratory judgment action was filed, and before it ever came on for a hearing, the court declared the ordinance invalid by reason of the barber shop case. So the question was mute. And that leaves it open, as far as in the minds of the Board of Directors, as to whether a community pool is a place of public accommodation.

17 Q. Did the question of the Association's policy as affecting Negroes come up at the November, 1969 membership meeting? A. Yes.

Q. And, again, the effort to amend the policy, or change the policy, was defeated? A. There was a resolution presented for consideration by the general membership which, as I recall, stated that membership should be open to people of all races, colors, creed, and what have you. Now, at that time it was put to a vote and it was defeated. Now, of course, there is no record kept of any voting at that time. But the final tally was available. I don't remember what it was, but it was defeated by about 12, 15 votes, something like that.

Q. Are minutes kept of general membership meetings? A. Yes.

Q. And who has the minutes of the membership and Board of Directors' meeting? A. The Secretary of the Association.

Q. Who is that at this time? A. Her last name is Abate, A-B-A-T-E. I don't know what her first name is – Helen maybe.

Q. Mrs. Anthony Abate?

18 A. That would be her husband's name. But I am sure that is it, yes.

Q. Coming forward then to more recent months, has there been further consideration of this question by the Board of Directors? A. Yes.

Q. Could you explain? A. At that November meeting, the vote seemed pretty decisive as reflecting the opinion of the general membership. Subsequent to the general membership meeting, we had a decision from the Supreme Court in the Sullivan case which, I would imagine, you are familiar with. I was of the opinion that that had some impact on the situation, and particularly in view of the litigation which had subsequently been filed in the Federal District Court in Baltimore, this case. I brought that to the attention of the meeting – this would be in January.

Q. Of this year? A. Yes. And proposed to the Board of Directors that this decision of the Supreme Court had a definite impact on the litigation in which we were involved. And I made a motion at that time to the Board of Directors that the policy with regard to admission of Negroes be changed. Pretty much the same one that was presented

19 in November, that membership should be accepted without regard to race or creeds, et cetera. That resolution that I made was subject to amendment, I think, by some member of the Board, who I don't recall right now, to the

effect that it should be passed and submitted to a special meeting of the membership. I accepted that amendment primarily to obtain another vote, and the resolution with its amendment then was presented to the Board of Directors and a written ballot was taken, and it was defeated. But that's the one where I had asked that my vote be recorded.

Q. What was the margin by which it was defeated? A. Eight to five, I think, although – don't hold me to that.

Q. Do you know how any of the other directors voted, or were they entirely secret? A. They were secret. I would imagine whoever presented the amendment must have voted in favor of it, so that was myself and the other individual, I think it was Sid Plitman, and then there was three others that voted with us. Present at that meeting, in addition to the Directors, were Phil Trusso who did not vote.

Q. Would you let us go through now – Trusso?

20 A. He was present although he is no longer a director. But he is a defendant in this suit. But he was present. And Bennington was present but did not vote.

Q. Who seconded your original motion before it was amended? A. I don't think it was seconded before it was amended. Sid Plitman was involved in it. That's a guess.

Q. But he wasn't a member of the Board? A. Yes, he is. He is a member of the Board.

Q . Oh, Trusso wasn't. I beg your pardon. So your principal source of support was from Plitman? A. I wouldn't say that he was my principal source of support, no. But I am reasonably confident that he voted with me.

Q. After the motion had been amended? A. Yes, because he proposed the amendment, I think.

Q. Going back to 1968, after you became aware of the Press interest in becoming a member, or the Presses interest of becoming members of the Association, could you, as a director, have raised this matter as at a Board meeting? A. I could have, yes.

Q. How often does the Board meet? A. During the swim season they meet twice a month. Other times they met once a month.

Q. Did you make any – A. Maybe they met more frequently during the swim season. Maybe every other week, I don't remember.

Q. Did you make any effort to raise it at a Board meeting? A. I am sure I did, yes.

Q. Could you explain? A. Well, it got to be to a point where I was regarded as having a one track mind at some of these directors' meetings, and it soon became evident to me that I wasn't getting anywhere at that point and time. So I quit.

Q. Quit what? A. Quit pushing the application. It was after this when I made an independent judgment that we weren't getting anywhere, that I told Dr. Press to hold off until after the general membership meeting, hoping that the vote would change.

Q. Would the minutes of Board meetings in the summer of 1968 reflect any discussions of this issue that were held? A. They would reflect some of them. I am sure they wouldn't reflect all. A lot of these discussions were off the record. Maybe not at convening directors meetings, but when I would have one or two or three people around. You see them at the pool and you chat with them a little bit.

Q. Were you present at a meeting in December of 1968 when a change was made in the guest policy of Wheaton-Haven? A. I believe that that was the subject of several

meetings. And I was at one of them, I believe. I am not sure.

Q. Was a vote taken? A. I was present at a meeting of the directors when this was the subject of some discussion.

Q. Was that the meeting when the policy was changed? A. What policy are you speaking of?

Q. Were you present at any Board meeting when a vote was taken with respect to the membership policy of Wheaton-Haven in 1968?

MR. HOWELL: In the summer of '68.

BY MR. BROWN:

Q. Summer of '68. A. With regard to the membership policy?

Q. Yes – guest policy, I beg your pardon. A. I honestly don't remember whether I was or whether I was not. I think the minutes would probably show the attendance at such a meeting. I may have been.

Q. Does Wheaton-Haven have a practice or policy of
23 refusing to allow members to bring Negroes as guests?

MR. HOWELL: Wait a minute. Do you mean at the present time, or what period of time?

BY MR. BROWN:

Q. Has it at any time, to your knowledge? A. It does now.

Q. I beg your pardon? A. I say it does now. And during the summer of 1968, sometime in that area, time lapse, when the policy was adopted with regard to guests being relatives of the member.

Q. What was the reason for adopting that policy? A. I think there was a general reaction to –

MR. HOWELL: Wait a minute. I have to object to this. Are you concerning this question with discussions

involved in the making of a policy? It is not clear when you say what were the reasons. The reasons of the directors or individuals, or what?

MR. BROWN: All right.

BY MR. BROWN:

Q. What change was made in the Wheaton-Haven guest policy in the summer of 1968?

MR. HOWELL: Objection. I don't think we have gone into what the policy was, or whether Mr. McIntyre knew or was aware of any particular policy with regard to guests.

BY MR. BROWN:

Q. Throughout 1968 you were a director? A. Right.

Q. Will you describe or relate the nature of the guest policy and any changes that took place in it in the year 1968? A. My understanding was that it was forbidden to bring a guest who lives within the geographical – certain geographical limits surrounding the pool. Anybody that lived within that geographical area could not be admitted to the pool unless, of course, he was a member. No guests from within that area. Other than that, and other than a fee that you paid for the guest, I think that was the only limitation on guests.

Q. Then how was that changed in 1968? A. It was changed to limit guests to relatives of the member involved.

Q. Was this change adopted at a meeting of the Board of Directors? A. I believe it was.

Q. When? A. Sometime in the swim season of 1968. I don't remember when.

Q. What was the nature of the discussion at the Board of Directors meeting when this policy was adopted? A. I think it was a discussion of large numbers of guests being brought to the pool.

Q. Would you explain that, please? A. It is difficult for me, Mr. Brown, to recite the nature of the discussion, or the author of such discussion, without – well, with any degree of accuracy. Other than being very general as far as that is concerned.

Q. Please be general. What were the things that precipitated this Board action? What was the nature of the discussion that preceded it? A. I think the nature of the discussion was that Mr. Tillman had a week or so before brought a Negro guest to the pool. And these are the facts about which I have no knowledge. I wasn't there when this thing occurred, and –

Q. When what thing occurred? A. When Mr. Tillman brought Mrs. Rosner to the pool, if that is in fact who he brought. I don't know.

Q. Were you at the Board meeting when this matter took place? A. I was at a Board meeting when this matter – and I am sure this was the subject of some discussion
26 at more than one Board meeting. And I remember my primary concern at one point and time was what instruction should the Board of Directors give to the gate attendants who were youngsters and not, in my opinion – to whom it would not be fair to ask them to admit or not admit certain people in their discretion, or what have you. And I was in favor of giving them specific instructions from the Board of Directors so these kids could know pretty much what they were doing. I proposed a resolution that the gate attendants be instructed to admit anybody's guest without regard to whether they were black or white. That resolution failed for want of a second. I then made a motion that the gate attendant should be instructed to bar all Negro guests, and that motion failed for want of a second. At which point I threw up my hands and went for a swim, I think.

Q. Do you recall who made the motion to adopt the present policy, that is, to limit guests to relatives of members? A. No, I don't.

Q. Do you recall the reasons given by the proponents of the motion? A. The announced reasons were to forestall the arrival of large numbers of guests, en masse.

27 Q. Just any kind of guest, or Negro guests in particular? A. I think the discussions were at that point to forestall large numbers of any kind of guests.

But to be truthful with you my recollection is not too strong on this Mr. Brown. Now, I am not trying to evade your question. I honestly don't remember the discussions.

Q. Was this new guest policy brought before the membership at the membership meeting in the fall of '68? A. Yes.

Q. And what happened at that time? A. This policy was approved at the general membership meeting. The policy of limiting guests to relatives of the members was approved by the membership. And I think it is safe to say this policy was then interpreted as meaning that no Negro guests or members should be admitted, although the language of the precise resolution did not refer to it.

Q. You are speaking of the new guest policy? A. Yes.

Q. Do you know whether since the current guest policy was adopted guests had been admitted who are not relatives of members?

28 A. To my knowledge, they have not. Although I don't pay very close attention to that sort of thing.

Q. So, are you saying they have not, are you saying you have not, or you don't know whether they have, or have not? A. I know of no guest who has been admitted who has not been a relative of a member. I have taken relatives over to the pool as a member, and I have refrained from taking non-relatives.

Q. Have you ever had occasion to check up on whether people are bringing non-relatives as guests? A. No.

Q. So you are really not familiar with the practice, other than what you do? A. That is right.

Q. You said that at the meeting at which this guest policy was adopted, you made two motions which are really diametrically opposite; the first was to admit Negroes, the other was to bar Negroes. A. They were in the form of instructions to be given to the gate attendants.

Q. When this matter was put to a vote, do you recall how you voted on it?

29 A. I don't think I even voted. I am not sure. It was a voice vote. And everybody seemed to be in favor of it. My voice in the wilderness would not be heard. I might add that I don't believe that the guest provision was at the same meeting as my resolution involving the instructions to the gate attendant. I think they were two separate meetings.

Q. But you were present at the meeting when the vote was taken on this present guest policy? A. I believe I was, yes.

Q. Are you familiar with the names and addresses of the – would you have a list of the names and addresses of the directors and officers for 1968, '69 and '70? A. I am familiar with them. I wouldn't venture to give them to you right offhand. That information is obtainable. I think you listed most of them as defendants.

Q. Well, most of them isn't enough. A. No, there are some that were missed, as a matter of fact.

MR. HOWELL: Off the record.

(Discussion off the record.)

MR. BROWN: Back on the record.

BY MR. BROWN:

Q. Mr. McIntyre, shifting now from the question of guest policy, membership policies, back to another matter involving Wheaton-Haven, do you know who the contractor was that constructed the Wheaton-Haven swimming pool? A. No.

Q. Does the Association have a maintenance contract with a firm to do annual work on opening it, and so forth? A. No.

Q. Who does the maintenance and upkeep? A. Well, it is usually done by certain individuals within the pool, Bernie Katz, for one. The actual physical –

Q. Excuse me, Bernie Katz does what? I don't understand what you said. A. He is currently the President, and he sort of supervises the cleaning and maintenance of the pool. Now, it is done – if certain of the equipment needs replacing and repair, and what have you, he will contract for its repair. But this is not on a continuing basis. I think if a part needs repairing and he knows somebody that makes parts, he calls them up and the man comes out and repairs or replaces it. But nobody does it as a matter of contract basis.

Q. I have never seen the Wheaton-Haven facility. What are its characteristics? Would you describe it? A. It is a 25 meter pool in the shape of a Z with a diving area at one end of the Z, and sort of a kiddies pool at the other end. There is a bathhouse there.

Q. Constructed of what? A. Oh, I think it is cinder block and wood. And then the usual filtration system.

Q. Is that housed in a part of the bathhouse, or is it a separate structure? A. No, it is a separate structure. It is sort of underneath the ground. You go down to a cinder block basement type area where the filter system is.

Q. Is the pool enclosed, or the property enclosed by a fence of some sort? A. Yes.

Q. What type – A. Anchor fence about six feet high, I am sure.

Q. Have you ever noticed on any of the equipment, or the anchor fencing, or the pumps, filters, that sort of thing, any labels indicating the manufacturer? A. No, sir, I haven't.

Q. Have you ever noticed any labels or signs indicating the source of materials used around the pool and owned by Wheaton-Haven Association?

MR. HOWELL: What is the relevancy of signs and labels?

32 MR. BROWN: To show interstate commerce because part of our basis for our complaint is based upon the 1964 Civil Rights Act, which requires a showing of some movement in interstate commerce.

MR. HOWELL: I think it is rather remote or speculative that this witness would know or have reason to know as to the interstate commerce aspects of the material. Now, I will permit him to answer. But I do interpose the objection.

MR. BROWN: I am only asking him if he knows. He obviously can't testify to anything he doesn't know.

MR. HOWELL: If he knows, he can answer.

THE WITNESS: They use chlorine gas, but I don't know where they get it. And they use some sort of a compound in the filter system, but I don't know where they obtain that either.

BY MR. BROWN:

Q. Is there any equipment that's used around the pool, such as beach chairs, or picnic tables, that sort of thing, that belong to the Association? A. Tables and chairs, yes.

Q. What is the nature of their construction, what ma-
33 terials are they constructed from? A. Aluminum and some sort of a plastic webbing.

Q. That is the chairs. What about the tables? A. I guess they are aluminum. I don't know.

Q. Is any merchandise sold on the pool premises, either through a snack bar or machines? A. There is candy and ice cream.

Q. Sold how? A. Some times they are vending machines there. They don't operate too efficiently. Other times they are kept in a freezer inside and dispensed by the gate attendant.

And this is on an annual basis, I think. They contract with some individual each season to supply them with candy and ice cream.

Q. And then the gate attendant sells it? A. We have done it both ways. One season the gate attendant would sell it, and the other season they had a vending type machine outside, coin operated machine.

Q. Outside where? A. In the bathhouse area, but it is outside the building. Under an overhang, or something.

Q. Would the sale of these foodstuffs result in a profit to anybody?

A. I believe the pool realizes some profit on it.

Q. Is anything besides candy and ice cream sold on the pool premises? A. Soft drinks, I think.

Q. Such as? A. I think we had a Coke machine there, whatever happened to be bottled by the Coca-Cola people, Sprite, or whatever it is.

Q. Are cigarettes sold? A. I don't think so.

Q. Is there any sale of anything like bathing caps, or sweat shirts? A. No, none of that stuff.

Q. Would you describe how these machines are located, are they set up in a bank, these vending machines? A. As

I recall, there is never more than two, a Coke machine and a candy machine, and maybe an ice cream machine. I just don't remember. But the kids go up and put a dime in it and open the machine and take out what they want. They are in a line-up there outside of the building.

Q. Who is in charge of hiring lifeguards and pool managers, and this kind of thing? A. Well, they have an Op-
35 erations Committee which changes from year to year, and that committee has that job.

Q. Does the Association hire a contractor who does that on a fee basis? A. No, we hire them ourself.

Q. Do you have any idea of the annual budget of the Association such as the amount of income from dues and other sources? A. Well, they compute the dues to sort of meet the operations expenses. It costs about $15,000 a season to run that pool. And that charge is divided up among the members.

Q. $15,000? A. That is a ballpark guess.

Q. Is the membership limit stated in the bylaws of 325 family units strictly observed? A. Some times we don't have 325.

Q. Do you ever go over 325? A. I don't think so. I think that's imposed by the special exception that they have from the County.

Q. Since 1968, up to the present time, has the membership been below the 325 level, to your knowledge? A. We are below it now. And I am not sure when precisely we fell below it. But it is below the number now.

36 MR. BROWN: That is all I have, Mr. McIntyre.

EXAMINATION BY COUNSEL FOR DEFENDANTS

BY MR. HOWELL:

Q. With respect to the vending machines, and the sale of candy or soft drinks, or refreshments, are these vending

machines enclosed within the pool area, or otherwise are they accessible to the public? A. No, they would not be. They are within a few feet of the water, really. On the deck up by the bathhouse.

Q. The sale of these items would be limited to members and their guests? A. Yes, you would have to be in the pool itself in order to be able to obtain them.

Q. Now, you mentioned the word profit in connection with these. Is this a profit to the Association, or is it a means of defraying expenses, or could you – A. It is a means of defraying expenses. By that I mean – I believe in the past it has been on a basis whereby we get some commission for having the machines located on the premises. And it goes through the Association to defray whatever expenses the Association has.

Q. But the Association is a non-profit organization, isn't it?

37 A. That is correct.

Q. You said that you have been a member of the Board of Directors since 1967, is that correct? A. I think I was elected to the Board of Directors in November of 1967.

Q. November of 1967? During your membership to the Board of Directors, did the question of racial or religious considerations arise with respect to membership or guests policy, while you were a member of the Board? When was the first time that it arose while you were a member of the Board, if ever? A. I think the first time it ever came up was when I inquired about it myself with regard to the Presses.

Q. Now, this –

MR. BROWN: Off the record.

(Discussion off the record.)

BY MR. HOWELL:

Q. Now, were these inquires undertaken at the request of Dr. or Mrs. Press? A. Well, I will put it this way – I understood they were interested in joining the pool, and as a member of the Board of Directors I spoke to the Presses about it, and then I presented it to the Board.

38 Q. When you spoke to the Presses they expressed interest in becoming members of the pool? A. Yes.

Q. And you ascertained they had the requisite qualifications under the bylaws of the Association? A. Right.

Q. In making these inquiries, this was to ascertain the reaction of members of the Board were a vote to be taken, a formal vote? A. That is correct.

Q. And what was your conclusion after making these inquiries? A. My conclusions were that they would not be admitted as members.

Q. In other words, had you proposed a resolution at that time what would your conclusions have been? A. My conclusions would have been that it would have been unsuccessful. My conclusion was that it was unsuccessful.

Q. During your membership on the Board of Directors, have you proposed that the Board or the Association adopt a policy to exclude members or potential members on the basis of race or religion, or national origin, color, or similar circumstances?

39 A. My proposals have always been to the opposite effect.

Q. Have you ever voted in favor of a proposal which would exclude persons on the basis of their race or color? A. No.

Q. Have you, as a member of the Board of Directors, ever proposed a policy limiting guests or members to members of the white or Caucasian race? A. No.

Q. Have you ever proposed or voted in favor of a policy which would exclude Negroes or persons on the basis of race or color? A. No. My votes in that fashion have always been to the other side of the coin.

Q. With respect to the requests, formal or informal by or on behalf of Dr. and Mrs. Press, have you at any time sought unfavorable action with regard to their request for membership. A. Would you repeat that? I am not quite sure I understand.

Q. Let me put it in simple terms. Have you ever proposed or voted that the Association turn down Dr. and Mrs. Press on the basis of their race or color?

40 A. Oh, no, no.

Q. Have you voted to reject them as members for any reasons? A. No.

Q. Have you taken a contrary position with respect to them? A. Yes.

Q. What is that position, sir? A. That they ought to be members of the pool.

Q. Now, with regard to Mrs. Rosner – it is Mrs., is that correct?

MR. BROWN: Yes.

BY MR. HOWELL:

Q. Have you ever met Mrs. Rosner? A. No.

Q. Have you ever proposed or voted against her becoming a guest of the Association, or have you acted in any way to deny her the use of the pool as a guest of a bonafide member? A. I don't believe I have.

Q. As a member of the Association, have you ever cast a vote one way or the other with respect to the admission or exclusion of guests or members on the basis of their racial –

41 A. Yes.

Q. Did you cast such a vote in the 1968 meeting in November of 1968? A. I think I did.

Q. Can you recall the general nature of the vote and what your vote was? A. At that point and time the vote was as to whether or not the policy to admit guests only relatives of members, was taken, and I voted against that policy. This was at a general membership meeting in which I voted as a member, and I think I spoke as a member, although I was seated in an area where the Board of Directors were.

Q. Now, also speaking with respect to your membership of your Association, have you taken a position or cast a vote at a general membership meeting in 1969, November of 1969? A. Yes.

Q. What was the subject, and how did you vote at that meeting? A. My vote was on a particular resolution presented by one of the members which, as I recall stated that membership should be open without regard to race, creed, color, et cetera. Litigation was – this present litigation was pending at that time. And I spoke to this resolution. And I asked Mr. Tillman several questions, which he answered from the floor. Thereupon, I spoke in favor of the resolution and cast my vote for the motion.

Q. This is the November of 1969 meeting? A. Yes.

Q. While you were a member of the Board of Directors, but prior to the inquiries made on behalf of Dr. and Mrs. Press, did the subject of race or color come up at any of the meetings of the Board of Directors? A. Never – well, that wasn't a particularly long period of time. I was elected as a director in November of 1967, and then I must have inquired say around April or May of 1968. But in that intermediate period there was no discussion of any nature without regard to membership regarding race.

Q. When you discussed the pattern or practice without regard to race or color, you are referring to the position of the Association with respect to the plaintiffs in this suit Dr. and Mrs. Press and Mrs. Rosner? A. I am not sure I understand the question.

MR. HOWELL: I will rephrase the question.

43 BY MR. HOWELL:

Q. When you stated that there was a pattern or practice of the Association, was this a pattern or practice which had arisen prior to Dr. and Mrs. Press seeking membership in the pool? A. I would assume so, yes.

Q. That is an assumption on your part? A. Yes.

Q. Did you take any part in adopting on behalf of the Association, or on behalf of the Board such a policy or practice? A. Well, I think the first meeting, general membership meeting I ever attended, was in November of 1967 when I was elected a director. And I have been to no meetings prior to that time.

MR. HOWELL: I have no further questions.

FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFFS

BY MR. BROWN:

Q. Mr. McIntyre, in the spring of 1968, when you became aware of the Presses interest in becoming members, Dr. Press' interest in becoming a member, you said that you spoke to a few people to get a sounding. Now, you have mentioned I think, if I am not mistaken, two people in particular that you spoke to. Correct me if I am wrong, I am trying to recall now. I think you said you spoke to Mr. Trusso and Mr. Sager. A. I am not real sure whether I spoke to Phil Trusso or not. I remember discussing it with Beverly Sager, who is the wife of Robert Sager, who was a member of the Board.

Q. You spoke to Mrs. Sager? Do you recall anyone else on the Board you discussed it with? A. I am sure I discussed it with three or four, but I don't remember just who or in what order.

Q. Three or four members of the Board, or just members of the Association. A. Members of the Board.

Q. Not including Mr. Sager, who was not a member of the Board? A. That is correct. Mr. Lane, – I don't remember discussing it with Mr. Lane, but I am sure it was at a discussion where he was present.

Q. How many members of the Board of Directors were there at that time? A. Fifteen.

Q. Do you know, since the summer of 1968, have new members been admitted to the Association?

45 A. Yes.

Q. Do you know of anybody that has been denied membership? A. No.

Q. Do you know of anybody that has ever been denied membership in the Association aside from the Presses? A. No.

Q. Do you know whether anyone has been denied membership who might have lived outside the geographical area, that is the three-quarter geographical limit? A. No – well, I don't know if anybody, really, has applied that lives outside the limit. To my knowledge, nobody has been denied membership that came to my attention.

Q. I see. Is it a fact then that, to your knowledge, there are no members who reside outside the three-quarter mile membership radius? A. No, I am sure some who do reside outside that area. We are permitted I think 30 percent of the total membership can live outside of that area.

Q. Well, is the general pattern for the pool to be below maximum membership so that people as they apply

are accepted, or is it general pattern that there is a waiting list?

46 A. I don't think there is a general pattern. When I first joined the pool, I made inquiry in the winter, and usually –

Q. Winter of what? A. It would be the winter of 1966 – '67. And if people are going to resign from the pool they usually do it in the fall after the swim season is over. So that's when you get your turn over. And I don't recall – I believe we had to wait until a certain number of resignations were processed, and then we were able to join. But the pattern has been that it was full that year. And I think then it has started to decline. So that there is – I don't know precisely how many members we have at this time, but I know it is less than 325.

Q. Are membership applications discussed at Board meetings? A. Yes.

Q. And they are approved at Board meetings?
A. That is correct.

MR. BROWN: That is all, Mr. McIntyre.

MR. HOWELL: No questions.

I have read the foregoing pages 3 to 46, inclusive, which contain a correct transcript of the answers made by me to the questions therein recorded.

_____

[Certificate of Notary Public]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MOTION TO STRIKE

The Defendants, Wheaton-Haven Recreation Association, Inc., Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and James M. Whittles, by their attorney, Henry J. Noyes, move this Honorable Court to strike from the Complaint in this case immaterial matter, as follows:

1. That paragraph V (C) of the said Complaint refers to a copy of the Opinion, including findings of fact, conclusion of law, panel decree and final Order, rendered on May 29, 1969, by the Montgomery County Commission on Human Relations, Panel on Public Accommodations.

2. That such fourteen page Opinion, findings of fact, conclusion of law, panel decree and final Order, is in fact attached to the said Complaint.

3. That the said Montgomery County Commission on Human Relations, Panel on Public Accommodations, and Public Accommodations Ordinance, known as Ordinance No. 4-120, enacted January 16, 1962, has been declared to be void and unenforceable by the Circuit Court for Montgomery County, Maryland, as is indicated by Opinion of the Honorable Irving A. Levine attached hereto and prayed to be made a part hereof.

4. That aside from the Opinion of the Honorable Irving A. Levine, the duties of the said Montgomery

County Commission on Human Relations, as set forth in Section 77-5 of the Montgomery County Code, (1965 edition as amended) in no way authorized the said Commission on Human Relations to make conclusions of law or enter Decrees and final Orders.

5. That any reference to ex parte proceedings before the Montgomery County Commission on Human Relations is immaterial and irrelevant to this case.

WHEREFORE, the Defendant pray:

1. That the Complaint be stricken.

Henry J. Noyes
Attorney for Defendants

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS, SUMMARY JUDGMENT, AND INJUNCTION

The Defendants, Wheaton-Haven Recreation Association, Inc., Bernard Katz, Philip S. Trusso, Sidney M. Plitman, Anthony J. DeSimone, Brian Carroll, Albert Friedland, Mrs. Robert Bennington, Mrs. Anthony Abate, James V. Welch, Mrs. Ellen Fenstermaker, Walter F. Smith, Jr., and

James M. Whittles, by their attorney, Henry J. Noyes, oppose Motion for Judgment on the Pleadings, Motion for Summary Judgment, and Motion for Preliminary Injunction, and for reasons state:

1. That following the filing of the original Complaint herein, the said Defendants timely filed a Motion to Strike, praying this Honorable Court to strike the entire complaint, for reasons more particularly set forth therein.

2. That no hearing has yet been set on the Motion to Strike.

3. That although the Plaintiffs allege that this Honorable Court granted leave to amend Complaint on March 12, 1970, and further allege that the Complaint was in fact amended, the Defendants have been served with no copy of such amended Complaint.

4. That a Motion to Dismiss, filed by the above named Defendants, is pending before this Honorable Court.

5. That the voluminous pleadings in this cause indicate substantial issues of material fact which preclude the Plaintiffs from obtaining Summary Judgment as a matter of law.

6. That the Plaintiffs, in praying for a preliminary injunction, baldly represent unto this Honorable Court that they will be irreparably injury unless such injunction is granted, without supporting facts.

7. That to the contrary, Montgomery County, Maryland has a substantial number of swimming pools, both public and private, which will amply serve the needs of the Plaintiffs, for the summer months, without inconvenience or injury in any respect, irreparable or otherwise.

WHEREFORE, the Defendants pray:

1. That the said motions be denied.

* * * * *

Henry J. Noyes
Attorney for Defendants

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

The Plaintiffs herein apparently rely heavily on the recent case of Sullivan vs. Little Hunting Park, Inc., 396 U.S. 229, in that their statement of the case calls the Sullivan case "indistinguishable" from the case at bar. To the contrary, the cases are vastly different, as to facts, that the provisions of 42 U.S.C. Section 1981 and 1982 are inapplicable.

In the Sullivan case, a pool member had an absolute right to transfer or assign his membership, without approval of the Board of Directors. Sullivan, a white man, in leasing his home to Freeman, a Negro, for One Hundred Twenty-Nine Dollars ($129.00) per month, attempted to assign his membership. The Board of Directors refused to allow the assignment, and expelled Sullivan from the Club. The

Supreme Court found that part of the One Hundred Twenty-Nine Dollars ($129.00) monthly rental was for the assignment of the membership share in Little Hunting Park. It then found 42 U.S.C. Section 1982 applicable, as follows:

> "All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

The Sullivan case is therefore closely tied in with the right to purchase or lease property, and the denial of such right. In the Wheaton-Haven case, the Plaintiffs, Press, purchased their home on June 21, 1967. There is no indication that they purchased such home with any representation that they would be afforded a membership in Wheaton-Haven, nor does it appear that any portion of their purchase price included an assignment or transfer of such membership. Indeed, the land records of Montgomery County, Maryland indicate that the purchase price was Thirty-Three Thousand Five Hundred Dollars ($33,500.00) and that they obtained a no down payment VA loan of Thirty-Three Thousand Five Hundred Dollars ($33,500.00).

As to the Plaintiff, Rosner, she sues on the basis that she is being denied the right to make and enforce contracts and has been denied the "right to use and enjoy facilities of public accommodation". No cases have come to the attention of the writer wherein vague theories have been asserted, much less upheld by the Courts. The contractual relationship, allegedly violated, is not set forth in the Complaint against Wheaton-Haven. Further, the Supreme Court has not yet gone so far as to state that a community

swimming pool is a "public accomodation", and did not so state in the Sullivan case.

The Defendants refer Your Honors to the dissent in the Sullivan case, which characterized the Supreme Court decision as "undiscriminating". The Defendant suggests that the case before Your Honors bears out the language of the dissent in the Sullivan case which referred to the "inevitable difficulties which the Court will encounter if it continues to employ Section 1982 as a means for dealing with the many subtle human problems that are bound to arise as the goal of eliminating discriminatory practices in our national life is pursued".

Henry J. Noyes
Attorney for Defendants

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MEMORANDUM OF DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1. The Plaintiffs herein by their original complaint, and subsequent motions, apparently rely heavily upon 42 U.S.C. Sections 1981 and 1982, as cited and interpreted in a recent Supreme Court case of Sullivan v. Little Hunting Park, Inc., 396 U.S. 229.

2. That the Plaintiffs, Harry C. Press and Francella Press, make no allegation in any of the pleadings that they were in any way deprived of any interest in the real estate which they purchased in June of 1967. Specifically, they made no allegation and make no allegation that they purchased the home, from its prior owner, with any representation by any present member, former member, or any of the Defendants, that they would be afforded or granted any privilege of membership in the Defendant corporation.

3. The Plaintiffs, Murray Tillman and Rosalind N. Tillman make no allegation that they have in any way been deprived of any of their rights to use the pool, as was the situation in the Sullivan case, and make no allegation that their right to bring guests is any different than all other members of the pool corporation.

4. The Plaintiff, Grace Rosner, makes no allegations of any fact, whatsoever, which would entitle her to recover under any Federal or State statute, local ordinance, or common law.

5. That although the Motion for judgment on the pleadings, or summary judgment, filed by the Plaintiffs, indicates that this Honorable Court granted leave to amend complaint on March 12, 1970, no amended complaint has been served upon the Defendants, or filed with the Court.

Respectfully submitted,

_____

Henry J. Noyes
Attorney for Defendants

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MOTION OF E. RICHARD McINTYRE
FOR SUMMARY JUDGMENT

E. Richard McIntyre, one of the Defendants herein, by John H. Mudd and H. Thomas Howell, his attorneys, moves the Court to enter summary judgment for the said Defendant on the entire action on the ground that there is no genuine issue of material fact and the Defendant is entitled to judgment as a matter of law. In support of said Motion, the Defendant refers the Court to the deposition of the said Defendant on file in these proceedings.

/s/ John H. Mudd
John H. Mudd

/s/ H. Thomas Howell
H. Thomas Howell
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Attorneys for E. Richard
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[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MEMORANDUM IN SUPPORT OF MOTION OF E. RICHARD McINTYRE, DEFENDANT, FOR SUMMARY JUDGMENT

E. Richard McIntyre, one of the Defendants herein, by his undersigned attorneys, respectfully submits the following points and authorities in support of his Motion for Summary Judgment.

The Defendant, E. Richard McIntyre, is joined to this action solely by reason of the allegation that he was an officer and/or director of the corporate defendant (Wheaton-Haven Recreation Association, Inc.) at the time of the events complained of. While the Plaintiffs complain of the collective acts of the officers and directors as a group, Defendant McIntyre is not otherwise mentioned in the Complaint and no wrongful act is attributed to him personally. This omission is sufficient of itself to require dismissal of the action as to Defendant McIntyre under the rule that officers and/or directors are not liable for corporate wrongs unless it affirmatively appears that the individual "specifically directed or actively participated or cooperated in a particular act of commission or omission * * *." *Fletcher v. Havre de Grace Fireworks Company*, 229 Md. 196, 177 A.2d 908, 910 (1966). See also 3 *Fletcher Cyclopedia Corporations* §1137 (1965 ed.), and cases cited therein; *Deutsch v. Aaron & Little Straus Foundation*, 155 F.Supp. 551, 552 (D.Md. 1959). Merely identifying Defendant McIntyre as one of the officers and/or directors of the Defendant corporation is manifestly insufficient to state a claim for relief against him individually.

From the deposition of the Defendant McIntyre, on file in these proceedings, it affirmatively appears that he did not direct or actively cooperate in any alleged unlawful discrimination. The deposition clearly indicates that he disassociated himself from racial policies but was consistently outvoted and overruled by a majority of the board of directors with respect to the Plaintiffs' eligibility for pool membership and/or guest privileges (see Dep. pp. 21, 25-26, 29, 37-43). For Defendant McIntyre to be exposed to litigation or subjected to liability is simply to discourage individual efforts at persuasion, conciliation, and internal reform.

What is said with respect to damage is equally true as to the Plaintiffs' claim for injunctive relief.

> "* * * [T]he officers, agents and stockholders of a corporation are not necessary parties defendant in either an action at law or a suit in equity against the corporation unless, generally, they have a distinct individual and indivisible interest or a distinct several liability as participants in the wrongdoing or breach of contract complained of; and it is ordinarily improper to join them as such parties defendant merely because of their relation to the corporation. And this rule undoubtedly obtains in the case of a suit for an injunctive as well as in the case of any other suit in equity." *Fletcher Cyclopedia Corporations* §4873 (1970 rev.), and cases therein.

And see *S.E.C. v. Union Corp. of America*, 205 F.Supp. 518, 521-522 (E.D.Mo.), affirmed 309 F.2d 93 (8th Cir.

1962) (injunction against corporation not extended to officers and directors not shown to have acted in bad faith).

John H. Mudd

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Attorneys for E. Richard McIntyre, Defendant

[Certificate of Service]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Caption omitted in printing]

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT McINTYRE AND/OR PRELIMINARY INJUNCTION

E. Richard McIntyre, one of the Defendants herein, by John H. Mudd and H. Thomas Howell, his attorneys, respectfully submits the following Memorandum in opposition to the Plaintiffs' Motion for Summary Judgment Against Defendant McIntyre, or in the Alternative, Motion for Summary Judgment Against All Defendants.

The action was commenced on or about October 13, 1969 seeking injunctive relief and damages and joining as Defendants the Wheaton-Haven Recreation Association, Inc. and thirteen of its directors, including the Defendant, Richard E. McIntyre. On December 5, 1969, Defendant McIntyre filed a timely Motion Pursuant to Rule 12, Federal Rules of Civil Procedure and requested an oral hearing thereon. Despite the lapse of six months, the Motion is still pending without any determination whether or not the Complaint states a claim for relief against Defendant McIntyre. Issue has not been joined. Prior to filing combined motions against all Defendants late in April, 1970, no attempt was made to schedule a hearing on the Motion of Defendant McIntyre. Quite the contrary, the Plaintiffs have twice sought and obtained successive extensions of time of ninety and thirty days in which to reply to said Motion.

Having moved at somewhat less than breathless speed, and perhaps sensing the approach of hot weather, Plaintiffs now demand a preliminary injunction to restrain all Defendants from denying to them membership and/or guest privileges to the community pool. In addition, Plaintiffs move for summary judgment against Defendant McIntyre (and for judgment on the pleadings against the remaining Defendants) without a prior opportunity to be heard on the Motion to dismiss and/or strike and before the joining of issue in this case.

On behalf of Defendant McIntyre, it is submitted that Plaintiffs are not entitled to summary judgment, preliminary injunction or any other relief sought and their motions must be denied for the following reasons.

1. The motion was premature in that motions to dismiss the Complaint are pending and have not yet been heard.

2. The Complaint fails to state a claim against the Defendant McIntyre upon which relief can be granted, as indicated in the Motion for Relief Pursuant to Rule 12, and the memorandum filed in support thereof.

3. Defendant McIntyre is improperly joined as a party to this action and must be dropped therefrom.

4. Neither the Complaint nor the Plaintiffs' motion disclose any basis for the relief sought by Plaintiff Tillman or Rosner.

5. It conclusively appears from the deposition of Defendant McIntyre, on file in these proceedings, that he did not engage in any unlawful act or policy complained of and that he is entitled to judgment as a matter of law. In the alternative, the said deposition shows the existence of genuine basis of fact precluding summary judgment for the Plaintiffs.

6. Neither the Complaint nor the Plaintiffs' motion disclose any basis for issuance of a preliminary injunction or other equitable relief, there being no showing of irreparable harm and it appearing that Plaintiffs are guilty of laches.

Respectfully submitted,

/s/ John H. Mudd
John H. Mudd

/s/ H. Thomas Howell
H. Thomas Howell
10 Light Street (17th floor)
Baltimore, Maryland 21202
LE 9-5040
Attorneys for E. Richard McIntyre, Defendant

[Certificate of Service]

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY MARYLAND	:	
Plaintiff	:	
vs.	:	NO. 36124 EQUITY
HERMAN ELLIOTT	:	
Defendant	:	

OPINION AND ORDER

Montgomery County, the Plaintiff herein, prays for a mandatory injunction compelling the Defendant, a barber shop operator, to comply with the County Public Accommodation Ordinance, *Ordinance 4-120*, now a part of *Chapter 77, Montgomery County Code, 1965.*[1] The

[1] "*Article II. Discrimination in Places of Public Accommodation.*
Sec. 77-8. Statement of policy.
It is hereby declared to be the public policy of the county that discrimination in places of public accommodation against any person on account of race, color, religion, ancestry or national origin is contrary to the morals, ethics and purposes of a free, democratic society; is injurious to and threatens the peace and good government of this county; is injurious to and threatens the health, safety and welfare of persons within this county; and is illegal and should be abolished. It is further declared that this article is intended to apply and shall apply to all places of public accommodation in this county, whether or not such places are listed in section 77-9 of this Code, except as otherwise expressly provided. * * *
Sec. 77-9. Applicability of article.
This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall
(continued)

County claims that the Defendant violates the Ordinance by refusing to serve patrons on account of their race.

In accordance with the provisions of the Ordinance, the County's Human Relations Commission Panel on Public Accommodations has previously held a hearing and found that the Defendant committed unlawful discriminatory practices in the operation of his barber shop. It is alleged here that the Defendant has refused to comply with the Panel's order that he cease and desist from engaging in his discriminatory practices.

The Defendant demurs to the Bill of Complaint upon several grounds. In the view which the Court is obliged to take of this case, it shall be necessary to consider but one of those grounds. The Defendant contends that the Ordinance is void *ab initio* in that it is distinctly legislative in nature under the test enunciated by the Court of Appeals in *Scull vs. Montgomery Citizens League, 249 Md. 271, 239 A.2d 92 (1968),* but was enacted in executive rather than legislative session.

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[1] (continued) apply and be applicable to every place of public accommodation, * * * whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public, either with or without charge, and shall include, but not be limited to, the following types of places, among others: * * * service establishments; * * *.

Sec. 77-10. Prohibited acts.

It shall be unlawful for any owner, lessee, operator, manager, agent or employee of any place of public accommodation, resort or amusement within the county;

(a) To make any distinction with respect to any person based on race, color, religion, ancestry or national origin in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

* * * * * * * * * "

The thrust of the County's argument in opposition to the demurrer is that, under the *Scull* test, the Ordinance was not legislation since it merely codified the common law innkeepers rule, and did not promulgate a "new plan or policy". Thus, the County contends, the subject matter of the Ordinance was amenable to executive action in an effort to "implement or administer" the otherwise prevailing common law rule.

In *Scull*, the Court of Appeals addressed itself to the problem created by the dual nature of the Montgomery County Council, which constitutes both the executive and legislative branches of the county government. Interpreting the Montgomery County Charter and the Express Powers Act, the Court distinguished between actions by the County Council which are essentially legislative and those which are essentially executive. Action by the County Council which prescribed a new plan or policy of general application is essentially legislative and may be validly enacted only while sitting in legislative session during the month of May (now from January 5 to February 3 of each year). On the other hand, action by the County Council which "merely looks to or facilitates the administration, execution or implementation of *a law already in force and effect*" is essentially executive and may be validly promulgated while sitting in executive session. *249 Md.* at *282, 239 A2d* at *98* (emphasis supplied). The Court concluded that distinctly legislative ordinances adopted by the County Council in executive session are "null and void". *Id.* at *284.*

Since the same representative body, the County Council, sits as both the executive and the legislature, there may appear – at least superficially – to be little need to delineate the respective powers of each. Nonethless, the Maryland "home rule" legislation and the Montgomery

County Charter each contribute significant reasons why such a delineation is essential.

First, *Article XI-A* of the Constitution of Maryland, which is the backbone of "home rule" in this State, specifically requires that a county council may enact legislation only during a time period specified in the county charter, not to exceed forty-five days per year. As the Court noted in *Scull*, "Section 3 of Art. XI-A requires [that there be] a charter provision for 'an elective *legislative* body in which shall be vested *the* law-making power' of the County." Moreover, "[t]he Charter must [provide that]: '* * * *all* legislation shall be enacted *at the time so designated for that purpose* * * *.'" *249 Md.* at *278*, *239 A2d* at *95-96* (emphasis in original). These constitutional restrictions were part of the political settlement under which "home rule" was first obtained in 1915. As the Court of Appeals stated in *Schneider vs. Lansdale, 191 Md. 317, 327, 61 A2d 671, 675 (1948)* and adopted in *Scull, 249 Md.* at *275*, *239 A2d* at *94*, "[t]hose who framed the amendment were fearful of a lawmaking body in continuous session and therefore the new authority to legislate was carefully restricted."

Second, the Montgomery County Charter complies with these Maryland constitutional requirements and in addition provides for popular referendum. As the Court noted in *Scull*, "Section 3 [of Article II of the Charter] 'General Legislative powers,' reads:

> "The county council is the elective legislative body of the county and *is vested with the lawmaking power thereof* * * *.'" *Scull, 249 Md.* at *278*, *239 A2d* at *96* (emphasis supplied).

Similarly, as the Court there noted, "Article II, Sec. 1, makes *the Council 'in legislative session' the body in which is vested exclusively the law-making power of the County* * * *." *249 Md.* at *281, 239 A2d* at *97* (emphasis supplied). Consequently, although "the executive branch of county government shall be composed of the county council in executive session" (Art. III, §1), Section 3 provides that "[t]he county council shall have power in executive session to: (a) Exercise all powers, *except powers to enact legislation* * * *." *Scull, 249 Md.* at *278-80, 239 A2d* at *97* (emphasis supplied). Additionally, *Article II, §6(a)* of the Montgomery County Charter specifically provides that:

> "The people of Montgomery County reserve to themselves the power by petition to have submitted to the registered voters of the county for approval or rejection by them * * * any public local law * * *."

Since the County Council in legislative session is vested exclusively with the power to enact "public local laws," only ordinances enacted in legislative session are subject to the right to petition for referendum. Consequently, the promulgation of distinctly legislative ordinances while the Council is sitting in executive session not only violates the Maryland constitutional delgation of authority to the County, but also deprives the people of a right to petition for referendum.

In delineating the scope of the Council's powers in executive and legislative session, the Court of Appeals adopted a "recognized test": An ordinance is subject only to legislative enactment, the Court said, if it " * * * is one making *new law* an enactment of general application prescribing new plan or policy * * *." *Scull, 249 Md.* at *282, 239*

A2d at *98*. Conversely, an ordinance may be adopted in executive session only if it " * * * is one which merely looks to or facilitates the administration, execution or implementation of *a law* already in force and effect." *Id.* (emphasis supplied).

The case at bar does not pose any question regarding the substance or constitutionality of Public Accommodations *Ordinance 4-120*. The primary question presented is the propriety of the mode of enactment of *Ordinance 4-120* as evaluated under the test announced in *Scull*. In particular, the issues raised are whether the common law innkeeper rule operates so as to prescribe racial discrimination by barbers and, if it does, whether the *Scull* test is satisfied by the County's "implementation" of a common law rule.

At common law, private businesses were generally allowed to refuse to deal with anyone for any reason. As early as 1460, however, the general rule was altered in the case of an innkeeper, so that "[i]f I come to an innkeeper to lodge with him, and he will not lodge me, I shall have on my case an action of trespass against him * * *." *Anonymous, Y. B. 39 H. VI 18.24 (1460) (Moile, J.); 3 Blackstone, Commentaries 166 (Lewis ed. 1902); Storey, Commentaries on the Law of Bailments* §§*475, 590-91 (9th ed. 1878);* see generally *Tidswell, The Innkeeper's Legal Guide (1964).* The adoption of the English common law by the American States brought with it the common law innkeeper rule, so that it has been generally recognized that the rule applies in virtually all of the states. E.g., see, *Heart of Atlanta Hotel, Inc. vs. United States, 379 U.S. 241, 261 (1964); Civil Rights Cases, 109 U.S. 3, 25 (1883) (Bradley, J.).* In particular, the Maryland Court of Appeals has acknowledged the applicability of the common law innkeeper rule

in Maryland. *Barnes vs. State, 236 Md. 564, 576-77, 204 A2d 787, 794 (1964); Drews vs. State, 224 Md. 186, 191, 167 A2d 341, 343 (1961).*

Most of the American cases discussing the common law innkeeper rule may be divided into two categories: those involving constitutional challenges to civil rights legislation, e.g., *Heat of Atlanta Motel, Inc. vs. United States, supra; Barnes vs. State, supra,* and those involving an attempted application of the innkeeper rule to a particular type of "public accommodation", e.g., *Slack vs. Atlantic White Tower System, Inc., 181 F.Supp. 124 (D. Md. 1960)* (restaurant); *Madden vs. Queens County Jockey Club, 296 N.Y. 249, 72 N.E.2d 697, 1 ALR2d 1160 (1947)* (racetrack); *Drews vs. State, supra* (amusement park); *Greenfield vs. Maryland Jockey Club, 190 Md. 96, 57 A2d 335 (1948)* (racetrack); *Bowlin vs. Lyon, 25 N.W. 766, 67 Iowa 536 (1885)* (skating rink). In the former group, the innkeeper rule found gratuitous approval in the context of showing that modern civil rights legislation has ancient roots.[2] In the latter group, the innkeeper rule formed the basis for relief but was rejected as inapplicable to the particular activity involved. Although none of these cases actually applied the common law innkeeper rule to prohibit racial discrimination by innkeepers, or anyone else, the opinions in each of the cases approve such an application in dicta.

Even though the rule may proscribe racial discrimination, it has not usually been interpreted as applying to all types

[2] In Justice Goldberg's concurring opinion in *Bell vs. Maryland, 378 U.S. 226, 299-300 (1964),* the common law innkeeper rule formed part of the basis for arguing that the 14th Amendment was intended to place an affirmative duty upon the states to eliminate racial discrimination in public accommodations.

of "public accommodations". (See cases cited above). The policy underlying the innkeeper rule is one of public necessity. Inns were and are essential for public travel, and, in ancient England, as in some parts of the United States today, they were "few and far between". "The traveler would be at the mercy of the innkeeper, who might practice upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night." *Wyman, The Law of Public Callings as a Solution to the Trust Problem, 17 Harv. L. Rev. 156, 159 (1903).* Since the otherwise prevailing common law rule was that the proprietor of a private business had absolute power to choose his customers, e.g., *Madden vs. Queens County Jockey Club, supra,* courts have strictly interpreted the coverage of the innkeeper rule. The English courts have applied the rule to persons providing lodging to transient guests (innkeepers), common carriers, and blacksmiths. See discussion in *Jackson vs. Rogers, 2 Show. 237 (1683) (Jeffries, C. J.).* American courts have been equally restrictive in defining the scope of the rule. The prevailing American rendition of the rule applies it to innkeepers and common carriers.[3] E.g., *Barnes vs. State, supra.* Although there might be a question as to its application to barber shops, there is some support for the view that the common law rule applies to all types of public facilities licensed by law. See *Bell vs. Maryland, supra;* but cf. *Drews vs. State, supra.*

Regardless of the scope of the innkeeper rule, it is clear to this Court that the County Council, sitting in its *legislative*

[3] One can speculate that the rule ought to apply to service stations since they are the modern equivalent of blacksmiths, and they are most certainly heirs to the same degree of public necessity which brought blacksmiths under the rule.

capacity, does have the authority to enact a public accommodations law. This *legislative* authority is not diminished by the fact that the law so enacted merely "implements" or "codifies" a common law rule. The legislative branch has always had the power to modify or codify the common law. *Lutz vs. State, 167 Md. 12, 15, 172 A 354, 356 (1934).* The ordinance here in question, however, was passed in *executive* session.

Therefore, the central and dispositive issue in this case is whether the County Council may utilize its *executive* powers to "implement and administer" a common law rule. *Ordinance 4-120* must be evaluated in terms of the scope of the Council's executive powers as they are enumerated in *Montgomery County Charter Article III, Section 3,* and interpreted by the Court of Appeals in *Scull.* It is upon this basis which we are compelled to find that the County Council, sitting in its *executive* capacity, has no power or authority to "implement or administer" a common law rule. Because of this conclusion, we need not now decide whether the common law innkeeper rule may be utilized to prevent racial discrimination in public accommodations and, if so, whether it applies to barber shops.

The County Council in executive session has no authority to "implement" common law rules because such implementation violates the rule announced in *Scull.* The Court said in *Scull* that the Council's executive power may be used to implement or administer "a law already in force and effect". The County here argues that "a law" includes the common law. The Court in *Scull* made it irrefutably clear that by "a law" it meant an ordinance *enacted* by the County Council in *legislative* session. As the Court stated:

> "* * * the Council in executive session * * * may implement and facilitate and insure the proper execution of *laws and ordinances passed by the Council in legislative sessions* * * * as the County Commissioners could have done in regard to public local laws passed by the General Assembly. *That the Council in executive session is to have no power to make law as such is made clear by and emphasized in various provisions of the Charter.*" *Scull, 249 Md.* at *281, 282, 239 A2d* at *97-98* (emphasis supplied).

Moreover, in formulating the legislative-administrative test which it announced in *Scull*, the Court relied on and cited *Vanmeter vs. City of Paris, 273 S.W.2d 49, 50 (Ky. 1954).* See *Scull, 249 Md.* at *282-83, 239 A2d* at *98.* In *Vanmeter* the Court of Appeals of Kentucky stated:

> "* * * the rule is that the power to be exercised is legislative if it prescribes a new policy or plan, and is administrative if it merely pursues a plan *already adopted by the [municipal] legislative body or some power superior to it* [such as the state legislature]." *273 S.W.2d* at *50* (emphasis supplied).

In addition, the Supreme Court of California has had occasion to state that: "* * * if the action be designed merely to carry into effect *a law already enacted* it may be said to be administrative rather than legislative action." *Kleiber vs. City and County of San Francisco, 117 P.2d 657, 659, 18 Cal. 718 (1941)* (emphasis supplied).

Finally, the Court of Appeals said in *Scull* that "[i]f an ordinance brings into being a law as distinguished from ordaining an implementation or the administration or execution of *an existing law*, it must be passed at a *legislative*

session of the council." *249 Md.* at *284* (emphasis supplied).

From these statements of the rule it is inescapably clear that *Scull*, which is controling here, limits the executive power of the County to the implementation of legislative enactments. Therefore, the Council may not utilize its executive power to implement a common law rule.

One of the foundations of our democratic institutions is the doctrine of separation of powers. In Maryland, this philosophical principle has been crystallized into a constitutional provision. *Article 8* of the *Declaration of Rights* of the *Constitution of Maryland* provides:

> "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."

The policy underlying this provision has been applied in situations involving executive encroachment upon judicial authority. In *Hoke vs. Lawson, 175 Md. 246, 257 (1938)*, the Court of Appeals was faced with the question of whether an agreement by a police commissioner regarding the application of a Maryland Gambling law would prevent the court from enjoining certain gambling activities. The Court there noted that "there is in our system no such relation between the courts and the administrative officials as would render agreements by the latter effective to preclude the ordinary action of the courts in applying the law as they find it." Similarly, in *Kentucky vs. Dennison, 65 U.S. (24 How.) 66 (1860)*, the Supreme Court of the United States in interpreting *Article IV, Section 2* of the United

States Constitution (fugitive extradition clause), concluded that a governor could not demand that a sister state deliver a fugitive "unless the party was charged in the regular course of judicial proceedings". The Court based its decision upon its view that:

> "[A]ccording to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department." *Id.* at *104.*

As these cases indicate, the judiciary has always had exclusive jurisdiction to interpret and apply the common law. Only *legislative* authority may be exercised so as to codify or modify a common law rule. As the Supreme Court noted in *Munn vs. Illinois, 94 U.S. 113, 134 (1875),* "the common law * * * may be changed at the will, or even at the whim, of the *legislature* * * *, [i]ndeed, the great office of *statutes* is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." (emphasis supplied). The Court of Appeals has long adhered to the principal that the legislature may modify or codify the common law. See *Lutz vs. State, supra.* However, unless the common law has been changed by legislative action, it is the duty of the *judiciary* to interpret and apply the common law in Maryland. *Damasiewicz vs. Gorsuch, 197 Md. 417, 439-40, 79 A2d 550, 560 (1951).* Consequently, *Ordinance 4-120,* even if it merely codified a common law rule, was

amenable to legislative process only and, as the product of the county's executive authority, is null and void.

In an effort to overcome the defects of *Ordinance 4-120*, the County makes several additional arguments: First, the County contends that any defect in *Ordinance 4-120* was cured through the enactment of Bill No. 1, Chapter 1 on May 10, 1966, by the County Council. Bill No. 1 provides:

> "Be It Enacted by the County Council for Montgomery County, Maryland, that – Sec. 1. The Montgomery County Code 1965, published under the supervision of the County Attorney, be and the same is hereby legalized and made prima facie evidence of the following matters therein contained; a. All local laws * * *."

The County contends that by "legalize" the Council meant to adopt anew all local laws contained in the Code.

Although Bill No. 1, Chapter 1 might be viewed as a "legislative enactment", any fair interpretation of the County's Charter requires that the Council not be permitted to distort the prescribed legislative process. One of the effects of enactment of a "public local law" by legislative process is the right of the people to petition for referendum. *Montgomery County Charter, Article II, §6(a).* By enacting *Ordinance 4-120* in executive session, that right was avoided. Similarly, because of Bill No. 1's clear purpose (to cure minor publishing or enactment defects) and its broad, equivocal language, it provides little or no effective notice to the populace that any new substantive plan or policy is being "authenticated". In short, Bill No. 1 does not serve sufficiently to apprise the voters of their

right to petition for a referendum on the Public Accommodations Ordinance.

Moreover, a codifying act as broad as this one could not be interpreted as manifesting the Council's intent to re-enact *Ordinance 4-120.* Such overly broad "curative" enactments are ineffective to constitute re-enactment of specific legislation. See *Certain Lots Upon Which Taxes Are Delinquent vs. Monticello, 31 So.2d 905, 159 Fla. 134 (1947).* In fact, overly broad curative enactments have been treated as unconstitutional. E.g., *Town of Davie vs. Hartline, 199 So.2d 280 (Fla. 1967);* cf. *E. McQuillin, 5 Municipal Corporations, Section 16.94 at 341 (3d ed. 1949).* Similarly, in *Harve de Grace vs. Bauer, 152 Md. 521, 527, 137 A 344, 346 (1927)* the Court of Appeals held that a legislative adoption and approval of minutes which inaccurately recorded that a resolution had passed did not validate or legitimize the bill because there is no intent when voting on such "procedural" motions to approve substantive legislation. As these cases indicate, Bill No. 1, Chapter 1, did not constitute a legislative enactment of *Ordinance 4-120.*

Second, the County argues that the Supreme Court's interpretation of the Equal Protection Clause in *Hunter vs. Erickson, 37 U.S.L.W. 4091 (Jan. 20, 1969),* requires that the County Council be permitted to enact civil rights ordinances while sitting in executive session. In *Hunter vs. Erickson, supra,* the Court dealt with an amendment to the Akron City Charter which provided that local fair housing ordinances become effective only after their approval by a majority vote of the people. In other words, the amendment singled out housing regulations "based on race" for mandatory referendum, rather than the otherwise prevailing right of the people to petition for referendum. As

the Court said, the Akron amendment constituted "an explicitly racial classification treating racial housing matters differently from other racial and housing matters". *37 U.S.L.W.* at *4092.*

The County's contention that in the case at bar, " * * * we have an analogous situation wherein the County Council can regulate places of business [etc.] * * * through * * * building regulations, etc. without the enactment of a local law * * *" is untenable. The flaw in the "analogy" is that neither the Montgomery County Charter, the Express Powers Act, nor the test enunciated in *Scull* attempt to single out "racial" topics for special procedures. The *Scull* distinction between implementation of existing laws and enactment of new policies applies equally to racial and non-racial topics.[4]

Third, the County contends that racial discrimination in public accommodations is a "badge of slavery" which is forbidden by the 13th Amendment. To be sure, racial discrimination is a "badge of slavery". *Jones vs. Alfred H.*

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[4] One might argue, which the County does not, that the "old-new" distinction created by *Scull* tends to thwart the passage of local civil rights laws; since most civil rights legislation, would be categorized as a "new policy," it requires a legislative enactment subject to referendum, whereas the remnants of "Jim Crowism" are "old" policies along with other matters not imbued with "racial" consequences and are thus amenable to executive action. Nonetheless, the problems with this argument are several: (A) It at least goes far beyond the holding of *Hunter vs. Erickson* regarding special procedures for racial matters, and probably goes beyond any future application of *Hunter.* (B) It presents an inaccurate picture of the existing legislation. Jim Crow legislation has been largely eliminated and is subject to direct attack under the 14th Amendment, and several civil rights enactments have found their way into the category of "old or existing law".

Mayer Co., 392 U.S. 409, 445-46 (1968) (Douglas, J., concurring). And, racial discrimination in public accommodations in particular imposes such a badge.[5] However, the 13th Amendment has not been interpreted as a self-executing prohibition of all such "badges". In the *Jones* case, both the Court and Justice Douglas concurring agreed that the issue was whether Congress had the power to enact a "fair housing" law (*42 U.S.C. §1982*) which would proscribe purely private discrimination. See *392 U.S.* at *439* (majority opinion); *392 U.S.* at *444* (concurring opinion). In finding that the 1866 law *did* and *could* apply to purely private discrimination (*i.e.*, without relying on either the 14th Amendment or the interstate commerce clause), the Court relied upon the power of Congress under Section 2 of the 13th Amendment "to enforce this article by appropriate legislation."

The *Jones* case stands for the power of Congress under Section 2 of the 13th Amendment, not for the self-executing coverage of Section 1 of the 13th Amendment. No court has ever held that the 13th Amendment by itself proscribes all "badges of slavery". See *E. S. Corwin, The Constitution of the United States of America, 1063-65 (1964 ed.).* For these reasons, the County's 13th Amendment argument is also inapposite.

Fourth, the County argues that the right to be free of racial discrimination by private businesses serving the public is one of the enforceable rights recognized by the privileges and immunities clause. Unfortunately, the privileges and

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[5] The Court in *Jones* indicated that the old view of the *Civil Rights Cases, 109 U.S. 1, 24 (1883)* that racial discrimination in public accommodations was *not* a badge of slavery may no longer command a majority. See *Jones, 392 U.S.* at *441 n. 78.*

immunities clause was rendered a "practical nullity" by the *Slaughter House Cases, 83 U.S. (16 Wall.) 36, 71, 77-79 (1873).* See *E. S. Corwin, The Constitution of the United States of America, 1076 (1964 ed.).* In *Twining vs. New Jersey, 211 U.S. 78, 97 (1908),* the Court enumerated the rights which it considered among the "privileges and immunities" of United States Citizenship. Freedom from private discrimination was not among them. Moreover, although the Court has applied the privileges and immunities clause to ensure freedom of interstate travel, *Edwards vs. California, 314 U.S. 160 (1941),* and to cut down state welfare residency requirements, *Shapiro vs. Thompson, 37 U.S.L.W. 4333 (April 21, 1969),* the Court has never held that the privileges and immunities clause alone proscribes private discrimination in public accommodations. This is not to say that Congress does not have the power to "reach" public accommodations via Section 5 of the 14th Amendment, but that is not at issue here.

For all these reasons, we find that Montgomery County Ordinance 4-120 was enacted by the County Council in violation of its authority under the Charter, and as such is unenforceable as a matter of law.

As we said earlier, our disposition of the case makes it unnecessary to reach the other arguments raised by the Defendant in his demurrer, viz., that the Ordinance does not apply to barber shops, that the State has pre-empted the field, and that the Ordinance violates the Defendant's 13th Amendment right to be free of involuntary servitude.

IT IS THEREUPON, this 12th day of September, 1969, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the Demurrer filed by the Defendant in the above-captioned matter be, and the same is hereby, SUSTAINED.

/s/ Irving A. Levine
IRVING A. LEVINE
Judge of the Circuit Court for
Montgomery County, Maryland

True Copy Test
Howard M. Smith
Clerk

/s/ Howard M. Smith

FOLD-OUTS ARE TOO LARGE TO BE FILMED